SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 101

WILLIAM VINCENT VITARELLI, PETITIONER,

vs.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, HARRIS ELLSWORTH, CHAIRMAN OF THE CIVIL SERVICE COMMISSION OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

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PETITION FOR CERTIORARI FILED JUNE 12, 1958
CERTIORARI GRANTED OCTOBER 27, 1958

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM VINCENT VITARELLI, Plaintiff,

—v.—

FRED A. SEATON, Secretary of the Interior of the United States, Washington 25, D.C.; PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, Washington 25, D.C., Defendants.

[fol. 11] APPENDIX B TO APPELLANT'S BRIEF

Newspaper clipping from Guam Daily News, dated Saturday, March 13, 1954—Vol. X No. 62.

SECURITY PROBE IN TRUST ISLES

FIVE EMPLOYEES WILL BE OUSTED AS "BAD RISKS"

Five Trust Territory personnel with several years service in the area are to be asked to resign as "security risks," Trust Territory High Commissioner Frank Midkiff confirmed yesterday.

Midkiff said the five are "scattered in various districts" of the Trust Territory and are the only ones of the 242 Americans employed in the territory to be under suspicion.

In almost every case, he said, the suspect will be permitted to resign, unless he chooses to fight. At least one has intimated he will demand a further hearing, Midkiff said.

Allegations are based on activities before coming to the territory, he continued and the suspects have been here "two or three years."

Midkiff stressed that the loyalty and patriotism of the five are not at issue.

"I doubt very much," he said firmly, "that any of them were mixed up with the Communist Party in the past."

Obviously disturbed by his distasteful chore of asking the resignations during his current tour of the islands and hesitant to discuss details of individual cases, Midkiff attributed his mission to the federal government's security program.

"Security due to the pressure of Communism is of increasing concern to our government," he said, choosing his words carefully.

"The President has ordered a new look through all departments of the government, particularly in any sensitive areas and positions to make sure they are safe and that no undue chances are being taken.

"There have not been very many new cases found—only a few, according to the President.

"The security section of each department in the government has restudied all cases, made their own decisions and reported to the secretaries of the departments, who have taken action.

"It is an attempt to be unusually cautious because of the new and mounting steps in international tension," he said.

He gave as an example of a security risk a known conscientious objector, saying that an advocate of pacifism is out of place in so sensitive and strategic an area as the trust territory.

"There is no question of disloyalty," he repeated.

Saying that it was an extremely difficult subject for him to discuss, Midkiff concluded:

"There are many conscientious and able people who, not because of their disloyalty or lack of patriotism, are judged best located elsewhere than in some possibly very sensitive area."

Asked if this meant the five would be relocated within the department of interior, Midkiff said sadly that he doubted it, because of the recent reductions in force for budgetary reasons.

[fol. 12] UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

PERSONAL

Registered Mail
Return Receipt Requested
Air Mail

Memorandum

To: Mr. William Vincent Vitarelli
Education and Training Specialist
Office of the High Commissioner
Trust Territory of the Pacific Islands
Honolulu, T. H.

From: The Secretary of the Interior

Subject: Suspension under Executive Order 10450 and Public Law 733, and Department Order 2738

1. By virtue of the authority vested in me by Executive Order 10450 dated April 27, 1953 (18 F. R. 2489) and the Act of August 26, 1950, (5 U.S.C., 1946 ed., Supp. V, Sec. 22-1 *et seq.*) as implemented by Department Order 2738, you are hereby notified that you are suspended from duty without pay and such suspension shall be effective at the close of business of the 2d day of April, 1954.

2. The reasons for your suspension and the charges against you, which are as specific as security interests permit, are as follows:

(a) That during the years 1941 to 1945, inclusive, but not limited thereto, you were either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party, including but not limited to the following particulars as to such affiliation and sympathetic association, to-wit:

(1) During the years 1941 to 1945, inclusive, but not limited thereto, you were in sympathetic association with persons who were members of, affiliated with,

or in sympathetic association with the Communist Party, including but not limited to the following named persons, to-wit: F---, also known as F---; W---; and W---, also known as W---.

[fol. 13] (2) In the year 1945 while you were a resident of New York City you registered a preference for the American Labor Party; the American Labor Party within New York City has been cited as being under the domination and control of the Communist Party or members thereof by a Special Committee on Un-American Activities of the House of Representatives of the United States, and by the State of California Committee on Un-American Activities.

(3) In your answer under oath of October 13, 1952, to the then Interior Department Loyalty Board you stated in effect that during the time you were teaching at Teachers College of Columbia University you subscribed to the USSR Information Bulletin and that you (and others interested) brought copies of the Daily Worker and of the New Masses.

The USSR Information Bulletin is the official publication of the Government of Soviet Russia and the Daily Worker and the New Masses are Communist publications which have been cited numerous times by the Special Committee on Un-American Activities of the House of Representatives of the United States.

It is noted that you also stated in connection with the above that bulletins from numerous other nations and many other publications were taken or procured and that the purpose of all the publications was to have on hand information about various countries of all political orientations. The purpose of this paragraph is to present the facts in connection with all of said publications and allow an inquiry into the purpose of the same.

(4) In your said answer under oath of October 13, 1952, hereinabove mentioned, you stated with regard to your acquaintance and association with the said F--- and the said W---, hereinabove named, in brief

as follows: Re F---; that you were not certain of his identity but believed he was the person you met in Georgia as F--- and that you would extend as much [fol. 14] information as you could remember about F---. This information was to the effect that you were introduced to Mr. F---, may have had another personal contact with him, but were not sure, and had a faint recollection that you may have written him one letter, but that your association with him was rather casual and short lived, and that you never knew he was connected with any Communist front; Re W---; That you did know Mr. W--- and had several visits and associations with him solely as a professional matter, as detailed in your said answer; and no other associations with him, but you never knew he was a member of or a leader in the Communist Party.

As to these associations it is alleged: That in fact your associations with the said F--- were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W--- were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that both the said F--- and the said W--- were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations.

(b). The Communist Party is a totalitarian and subversive organization which has adopted, maintained, and showed a policy of advocating or approving the commission of acts by force or violence to deny persons their rights under the Constitution of the United States and which has sought and now seeks to alter the form of the government of the United States by unconstitutional means. The Communist Party has been designated by the Attorney General of the United States as being within the purview of section 8(a)(5) of Executive Order 10450.

[fol. 15] 3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and

the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security.

4. You are hereby advised of your right and opportunity to submit any statements, answer, or affidavits to the Secretary of the Interior within 30 days after receipt of this notice to show why you should be reinstated or restored to duty. All such statements, answer, and affidavits should be sworn to under oath and it should be noted that any deliberate misrepresentations, falsifications, or omission of material facts may constitute sufficient basis for removal. You may also request a hearing before a board duly constituted for that purpose. I will review and consider such statements, answer, and affidavits, if any are submitted by you, and the recommendation of the hearing board if a hearing is requested, and within 30 days thereafter you will be notified of my decision to either terminate your employment if I shall determine that such termination is necessary and advisable in the interests of the national security of the United States, or to reinstate you to your former employment. If you are reinstated you shall be allowed compensation for all of the period of your suspension, but the amount shall not exceed the difference between the amount you would normally have earned during the period of suspension at the rate you were receiving on the date of your suspension and your interim net earnings.

5. There is enclosed a copy of Departmental Order No. 2738 to which are attached copies of Executive Order 10450 and Public Law 733 (The Act of August 26, 1950).

/s/ Douglas McKay
Secretary of the Interior

Enclosure

[fol. 21]

Joint Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2870-56

WILLIAM VINCENT VITARELLI, Erwinna, Pennsylvania,
Plaintiff,

—against—

FRED A. SEATON, Secretary of the Interior of the United States, Washington 25, D.C.; PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, Washington 25, D. C., Defendants.

COMPLAINT FOR A DECLARATORY JUDGMENT AND INJUNCTION
—Filed July 10, 1956

Plaintiff, appearing herein by his attorney, Clifford J. Hynning, for his complaint against the defendants, respectfully alleges as follows:

First. This is a civil action for a declaratory judgment and other equitable relief to restore plaintiff to employment in the Education Department of the Trust Territory of the Pacific Islands, Department of the Interior. This action arises under the Constitution and laws of the United States and involves a matter in controversy, exceeding the sum or value of $3,000.00, exclusive of interests and costs.

Second. Jurisdiction of this Court over the subject matter is founded upon United States Code, Title 28, Sections 1331, 1332, 2201, and 2202, United States Code, Title 5, Section 22-1 and 1009, and District of Columbia Code, Sections 11-305, and 11-306. Jurisdiction is also based on the Fifth Amendment to the Constitution of the United States and on Articles I and III thereof.

[fol. 22] Third. Plaintiff is a citizen of the United States and a citizen of Pennsylvania residing in Erwinna, Bucks County, in the Eastern District of Pennsylvania, and brings this action in his own right.

Fourth. Defendant Fred A. Seaton is Secretary of the Interior of the United States of America, who has adopted or continues the actions of his predecessors in the suspension and removal of plaintiff from, and the refusal to restore plaintiff to, his position in the Department of the Interior, as herein alleged, and is hereinafter called "defendant Secretary." The official residence of defendant Secretary is in the District of Columbia.

Fifth. Defendants Philip Young, George M. Moore, and Frederick J. Lawton are members of the United States Civil Service Commission, hereinafter called "defendant Commissioners." The official residence of each of them is in the District of Columbia.

Sixth. On August 6, 1951, plaintiff was employed by the Department of the Interior pursuant to Civil Service Regulation 6.101(lr), Schedule A; he acquired the right to this employment by meeting the requirements of said regulation; and, having completed his trial period, he became an employee holding an "indefinite appointment" within the meaning of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. Code 22-1, hereinafter called the "Act of August 26, 1950").

Seventh. Plaintiff was employed as education and training specialist in Koror, Western Caroline Islands, of the Trust Territory of the Pacific Islands, Department of the Interior, and his duties consisted of administering and fostering an educational program for the native people of the Palau District of the Trust Territory, including teacher training and the preparation of teaching materials. At time of suspension, plaintiff received a salary of $6,140 per year, plus 25% overseas differential.

[fol. 23] Eighth. Plaintiff's position in the Department of the Interior was at no time a "sensitive" position, whether by official designation of the Department of the Interior under Sec. 5(a) of the Departmental Security

Regulations (Order No. 2738, dated November 9, 1953) or by the nature of plaintiff's duties, which did not put him in contact with, or give him access to, authorized or unauthorized, any "confidential" or "secret" or "classified" information or material; nor was he in a position to influence action or policy against the interests of the Government of the United States, or otherwise to aid or assist internal subversion or foreign aggression against the United States; and plaintiff was not subject to the summary removal powers under the Act of August 26, 1950.

Ninth. Plaintiff has, at all times, rendered full and completely satisfactory service in his position as education and training specialist, as aforesaid, has received official ratings of "excellent," and has secured favorable commendations from his superiors.

Tenth. Plaintiff is and has always been completely and unswervingly loyal to the Government of the United States, and defendant Secretary has so conceded on the record through the departmental security officer.

Eleventh. On or about April 3, 1954, plaintiff received in Koror a dispatch from the High Commissioner of the Trust Territory together with an abstract of a letter from defendant Secretary suspending plaintiff (omitting the charges) as of the close of business on April 2, 1954, which date was later extended to April 5, 1954. On or about April 8, 1954, plaintiff received a registered air mail letter from defendant Secretary notifying plaintiff of his suspension and setting forth the charges against plaintiff. Defendant Secretary also advised plaintiff of his right to answer and request a hearing within 30 days after the receipt of the letter.

[fol. 24] Twelfth. Plaintiff immediately requested travel authority from Koror to Washington, D. C., but was informed by a dispatch from the High Commissioner of the Trust Territory that he was "not entitled travel at Government expense unless resigning." Plaintiff was subsequently authorized to travel, and proceeded to Washington, D. C., for the purpose of preparing an answer to the charges. Plaintiff perforce left his wife and four children

in Koror where they remained separated from plaintiff by thousands of miles for many months, dependent upon such funds as plaintiff could send from his scanty earnings on odd jobs which he secured while preparing his defense to the charges, attending the hearings, and waiting for the judgment of defendant Secretary, with all the attendant difficulties of familial communications over such geographical distances during such trying days for plaintiff. After plaintiff's removal as a so-called "security risk" by order of defendant Secretary, as hereinafter alleged, the government at long last provided transportation for the return of plaintiff's wife and four children to the United States.

Thirteenth. Plaintiff filed with defendant Secretary a written answer, together with 44 affidavits concerning his loyalty and character. On June 11, 1954, defendant Secretary informed plaintiff that the answer and supporting documents "do not constitute sufficient grounds to reinstate" plaintiff.

Fourteenth. On June 22, and July 1, 1954, plaintiff, together with counsel, appeared before a so-called security hearing board, which consisted of three members drawn from the Departments of Commerce, Justice and Agriculture. No evidence or testimony was adduced at this hearing on behalf of the Department of the Interior. Plaintiff was not confronted with any witnesses against him and did not have the right to subpeona (sic) witnesses. Therefore, he could not cross-examine his accusers or answer or rebut their statements against him. Nor was he given the text of the statements that had been made against him. In his testimony plaintiff categorically denied membership in or affiliation or sympathetic association with the Communist Party or its sympathetizers (sic) and gave [fol. 25] a complete, candid and factual explanation of all the matters contained in the written charges. The security officer of the Department of the Interior conceded on the record that plaintiff's loyalty was not in issue. In addition, four witnesses testified on plaintiff's behalf.

Fifteenth. By letter dated September 3, 1954, plaintiff received from the Director of the Office of Trust Terri-

tory, a copy of "Findings and Final Determination" by defendant Secretary, dated September 2, 1954, in which defendant Secretary found "it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954, "without stating which of the charges were sustained against plaintiff. Nor did these purported findings state that plaintiff held a "sensitive position" in the Department of the Interior. Plaintiff's employment was terminated as of the close of business on September 10, 1954.

Sixteenth. Plaintiff has received several conflicting official explanations why he was suspended and removed as a "security risk" from his position in the Department of the Interior. He learned of his probable suspension through an announcement to the press on March 12, 1954, by the High Commissioner of the Trust Territory of the Department of the Interior who stated in Guam that five Trust Territory employees were officially to be asked to resign as "security risks" and identified one of them as a "known conscientious objector, saying that an advocate of pacifism is out of place in so sensitive and strategic an area as the Trust Territory." This public reference was to plaintiff whose pacifism was known. This official press announcement also conflicts with the fact that plaintiff's position has never been designated as "sensitive" by the Department of the Interior, as hereinbefore alleged.

[fol. 26] Seventeenth. An entirely different explanation was officially given plaintiff by defendant Secretary in the letter of removal, which, by referring to the letter of charges, indicated that plaintiff was removed because of his associations prior to his employment by the Department of the Interior.

Eighteenth. Another entirely different explanation was officially given plaintiff's original counsel (who remains of counsel) by the Solicitor of the Department of the Interior to the effect that plaintiff had been removed because of an investigative report which had been received in the

Department of the Interior after the filing of the letter of charges and which was not necessarily reflected in the letter of charges.

Nineteenth. Another entirely different explanation was given plaintiff's original counsel by the personnel officer for the Trust Territories of the Department of the Interior to the effect that plaintiff had not been removed for any subversive association or activity, as implied in the explanation set forth in paragraph seventeenth above, but because plaintiff had exhibited "lack of common sense" during his employment by the Department of the Interior in the South Pacific.

Twentieth. On the basis of the allegations in paragraphs sixteenth through nineteenth, plaintiff avers that certain persons in the Department of the Interior desired to oust plaintiff; that the so-called security proceedings against him were brought for this purpose and not for the reasons set forth in the letter of charges; and that efforts were officially made to force plaintiff to resign by threats not to give him transportation to the mainland where he could defend himself and by threats not to pay the cost of bringing his wife and four children home for many months during which period plaintiff received no pay or allowances.

[fol. 27] Twenty-first. By petition, presented to defendant Secretary on October 25, 1955, plaintiff applied for reinstatement or rehearing. This petition resulted in the taking of certain testimony on November 14, 1955, of the personnel officer of the Trust Territories of the Department of the Interior. This petition was denied by defendant Secretary on May 11, 1956.

Twenty-second. On June 12, 1956, plaintiff by his attorney made a written demand upon defendant Secretary to restore him to duty forthwith in accord with the decision of the Supreme Court in *Cole* v. *Young*, but defendant Secretary has so far failed to comply with this demand.

Twenty-third. Plaintiff has exhausted all the remedies available to him under applicable administrative procedures and has no adequate remedy at law other than the

instant action, under the jurisdiction conferred upon this Court, for the irreparable damage he has suffered and continues to suffer as a result of the unlawful and unconstitutional acts of defendants which acts branded plaintiff as a "security risk" as hereinbefore alleged, have caused him to lose his employment and have resulted in a continuing injury to his reputation and to his health.

Twenty-fourth. Plaintiff's suspension and removal as a "security risk" under Executive Order 10450 was in violation of the Act of August 26, 1950, and the Lloyd-LaFollette Act (5 U. S. C. 652 (a)) in that the aforesaid executive order and the applicable regulations of the Department of the Interior adopted pursuant thereto, purported to establish a universal standard—"clearly consistent with the interests of the national security"—to be applied to all agencies and to all positions in each agency without regard to the fact that plaintiff's position had not been officially determined to be "sensitive" by the Department of the Interior, as aforesaid, nor was his position concerned with activities relating to the Nation's safety or to the "national security" as that standard was used in the Act of August 26, 1950.

[fol. 28] Twenty-fifth. Plaintiff's suspension and removal as a "security risk" were not authorized by law in that the statement of charges was not worded with sufficient specificity as to be meaningful to plaintiff or to enable him, on the assumption of innocence, to prepare an effective answer, and such charges were fatally vague and indefinite and worded in several alternatives, without specifying the times, places, or events concerning which plaintiff was alleged not to have told the truth, in violation of the Act of August 26, 1950, and the "due process clause" of the Fifth Amendment to the Constitution of the United States.

Twenty-sixth. Plaintiff's removal was not authorized by law in that he was not accorded a fair and impartial hearing in June, 1954. The failure of defendant Secretary to afford plaintiff a fair hearing is further evidenced by the facts of record in the transcript of the proceedings before the so-called security hearing board which wandered far afield, without any discernible standards of relevancy

or materiality, from the matters set forth in the letter of charges. In particular, plaintiff was examined on whether he thought the security program was a Republican plot to get rid of Democrats, on his views on racial segregation, on discrimination against Jews at Columbia University, on methods of pricing cotton in Georgia, on whether he had "heard" of a great variety of organizations which were not listed in the letter of charges, on whether Bucks County in Pennsylvania is a "depressed-area", on "Black Mountain transcendentalism," whatever that may be, on whether he voted for Henry Wallace in 1940 (for the vice presidency), on whether he "was quite hepped up over the one-world idea" and whether he "was still (i.e., June, 1954) a strong advocate of the United Nations."

Twenty-seventh. Plaintiff's removal was not authorized by law in that the so-called security hearing board failed to accord plaintiff "fair, impartial and equitable treatment", as required by the Civil Service Handbook Guide for Members of Security Hearing Boards under Executive [fol. 29] Order 10450, and failed to exercise an independent judgment with respect to the kinds of information to be withheld from plaintiff under the guise of "classified matter" by the security officer of the Department of the Interior whose determinations in this regard were regarded as final and binding upon the said board. By so limiting itself, the said board completely failed to function as an impartial agency authority to hear and judge between the contentions of the security officer of the Department of the Interior and the evidence presented on behalf of plaintiff, in violation of the Act of August 26, 1954, and the "due process" clause of the Fifth Amendment to the Constitution of the United States.

Twenty-eighth. The so-called security hearing board and defendant Secretary assumed the accuracy of the so-called "confidential file" and assumed that plaintiff's testimony in variance therewith, if there were a variance, showed plaintiff to be untruthful and unreliable, and failed to reach an independent judgment with respect thereto, in violation of the Act of August 26, 1950, and the due process clause

of the Fifth Amendment to the Constitution of the United States.

Twenty-ninth. Nothing in the so-called "confidential file" on plaintiff is believed genuinely to bear upon the "interests of the national security", as that standard is used in the Act of August 26, 1950. On the contrary, it is believed that the said file, if it exists, consists solely of unsworn and unsubstantiated statements by persons who, if identified, would fear to confront plaintiff and submit to cross-examination; and consequently the so-called "classified file," if it exists, was withheld from plaintiff in violation of the Act of August 26, 1950, Executive Order 10450 and the departmental security regulations in pursuance thereto.

Thirtieth. The removal of plaintiff by defendant Secretary, as aforesaid, was arbitrary and capricious and in further violation of the "due process" clause of the Fifth Amendment to the Constitution of the United States, in that there was no evidence of record to support the finding [fol. 30] of the so-called security hearing board and defendant Secretary considered—as against the sworn testimony of plaintiff and his witnesses and affidavits of plaintiff's witnesses, which attested to the facts of plaintiff's complete and unswerving loyalty to the United States Government—so-called "confidential information" based on statements of so-called "confidential informants," none of which information was disclosed under oath, and said board and defendant Secretary did not know of the circumstances surrounding such information, which would be relevant to an evaluation of the reliability or credibility of said "confidential informers" and said "confidential information."

Thirty-first. The removal of plaintiff by defendant Secretary, as aforesaid, was in violation of the Act of August 26, 1950, in that plaintiff was never furnished with the written statement of the decision of defendant Secretary as required under that Act, nor did any decision purporting to remove plaintiff inform him as to what specific charge, if any, had been used as a basis for the removal of plaintiff "in the interests of the national security"; and such pur-

ported action of defendant, as aforesaid, was taken in violation of the "due process" clause of the Fifth Amendment to the Constitution of the United States, in that plaintiff was never furnished with a copy of the findings and conclusions of the so-called security hearing board.

Thirty-second. The removal of plaintiff by defendant Secretary, as hereinbefore alleged, has deprived plaintiff of his employment and compensation since on or about April 5, 1954, and thereby deprived plaintiff of liberty and property without due process of law, and the resulting actions by defendant Secretary and defendant Commissioners have branded him with "a badge of infamy" as a risk to the security of his country, arbitrarily and capriciously, without basis in fact, without a fair hearing or procedure, and constitute official defamation of plaintiff without probable cause. By reason thereof, as herein set forth, plaintiff's reputation as a professional educator has been destroyed and it has become virtually impossible for him to obtain employment in his field of training.

[fol. 31] Thirty-third. Defendant Secretary has refused and continues to refuse to restore plaintiff to his position with the Department of the Interior, as aforesaid; and defendant Commissioners have listed plaintiff's name on the civil-service rolls as a person who has been removed as a "security risk" after a hearing pursuant to Executive Order 10450.

Thirty-fourth. By reason of the premises, plaintiff is entitled to relief against defendant.

Thirty-fifth. No prior application for this or any other relief has been made to this or any other Court.

Wherefor plaintiff prays for the following relief:

1. That the actions of defendant Fred A. Seaton, Secretary of the Interior, and his predecessor, in suspending and removing plaintiff from his employment in the Department of the Interior on or about September 10, 1954, be set aside and declared null and void and illegal and in violation of the Act of August 26, 1950; in violation of the Lloyd-LaFollette Act (5 U. S. C. 652 (a)); in violation of Execu-

tive Order 10450 and the security regulations of the Department of the Interior adopted pursuant thereto insofar as they are here applicable; in violation of the Fifth Amendment to the Constitution of the United States and Articles I and III thereof; and that defendant's actions be declared arbitrary and capricious.

2. That Executive Order 10450 as amended, and the security regulations of the Department of the Interior pursuant thereto, be declared unconstitutional and of no effect as applied to plaintiff in that said Executive Order and said regulations abridge plaintiff's rights under the Fifth Amendment to the Constitution of the United States and Articles I and III thereof.

3. That a mandatory injunction issue directing:

(a) Defendant Fred A. Seaton, Secretary of the Department of the Interior, his deputies, agents, attorneys and all those acting under or in concert with him, to reinstate and restore plaintiff to the position held by him at the time of his suspension on April 2, 1954, with all the rights [fol. 32] and status which he then had and which would have accumulated to the date of such reinstatement and restoration had he not been unlawfully discharged, and that plaintiff receive all salary and compensation which he would have received from the date of his unlawful suspension to the date of such restoration, in accord with the provisions of the Act of August 26, 1950.

(b) Defendants Philip Young, George M. Moore, and Frederick J. Lawton, members of the United States Civil Service Commission, to restore plaintiff to the place on all civil-service lists which he had immediately prior to his unlawful suspension with all the rights and status he then had and which would have accumulated had he not been unlawfully suspended and removed.

(c) Defendants Fred A. Seaton, Secretary of the Interior, and Philip Young, George M. Moore, and Frederick J. Lawton, members of the United States Civil Service Commission to expunge all records in their possession, custody, or control relating to plaintiff's discharge and of all pro-

ceedings thereto; and to refrain from interfering in any way with plaintiff's full reinstatement and restoration to his position in the Department of the Interior.

4. That plaintiff be granted such other and further relief as the Court shall deem proper.

/s/ Clifford J. Hynning, Attorney for Plaintiff.

Of Counsel
Allen S. Olmsted, 2nd, Saul, Ewing, Remick & Saul, 2301 Packard Building, Philadelphia 2, Pa.

[fol. 33]

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed September 10, 1956

Now come the defendants, Fred A. Seaton, Secretary of the Interior of the United States, Philip Young, Chairman, George M. Moore, and Frederick J. Lawton, Members of the Civil Service Commission of the United States, and in answer to the complaint say as follows:

First Defense

1. Answering paragraph 1 of the complaint, defendants deny the allegations contained therein.

2. Answering paragraph 2 of the complaint, defendants deny the allegations contained therein.

3. Answering paragraph 3 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

4. Answering paragraphs 4 and 5 of the complaint, defendants admit the allegations contained therein.

6. Answering paragraph 6 of the complaint, defendant Secretary of the Interior denies the allegations contained therein, except that he admits that on August 6, 1951, plaintiff was appointed by the Department of the Interior under Civil Service Commission Regulation 6.101(h) which does not confer competitive civil service status. A certified copy of plaintiff's Standard Form 50 relating to his appointment is attached hereto.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6.

7. Answering paragraph 7 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7.

[fol. 34] 8. Answering paragraph 8 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8.

9. Answering paragraph 9 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9.

10. Answering paragraph 10 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to plaintiff's loyalty to the United States, except that Defendant Secretary of the Interior denies that plaintiff's loyalty has been conceded on the record. Defendant Secretary of the Interior states that on October 21, 1952, the Interior Department Loyalty Board, pursuant to E. O. 9835, found that there was no reasonable doubt as to plaintiff's loyalty.

11. Answering paragraph 11 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11.

12. Answering paragraph 12 of the complaint, defendant Secretary of the Interior admits that plaintiff re-

quested travel authority from Koror to Washington, D. C., that he was at first informed that he was not entitled to travel at Government expense unless resigning, that plaintiff was subsequently authorized to travel, and that transportation at Government expense was also provided for plaintiff's family. Defendant Secretary of the Interior states that he is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 12.

[fol. 35] Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12.

13. Answering paragraph 13 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13.

14. Answering paragraph 14 of the complaint, defendant Secretary of the Interior admits that on June 22 and July 1, 1954, plaintiff together with counsel appeared before a security hearing board which consisted of three members drawn from the Departments of Commerce, Justice and Agriculture. Defendant Secretary of the Interior further admits that at the hearing plaintiff was not confronted with any witnesses against him, that four witnesses testified in plaintiff's behalf, and that the contents of confidential information concerning plaintiff were not disclosed to him. Except to the extent hereinbefore admitted, defendant Secretary of the Interior denies the allegations of paragraph 14.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14.

15. Answering paragraph 15 of the complaint, defendant Secretary of the Interior admits the allegations contained therein, except that he denies that the findings by the Secretary of the Interior were "purported" findings.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 15.

[fol. 36] 16. Answering paragraph 16 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief, except that defendant Secretary of the Interior denies that plaintiff was given conflicting official explanations of his removal.

17. Answering paragraph 17 of the complaint, defendant Secretary of the Interior denies the allegations contained therein, except that he admits that in his letter of September 2, 1954, containing his Findings and Final Determination he stated that: "I find it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954."

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17.

18. Answering paragraph 18 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

19. Answering paragraph 19 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

20. Answering paragraph 20 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

21. Answering paragraph 21 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

[fol. 37] Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 21.

22. Answering paragraph 22 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22.

23. Answering paragraph 23 of the complaint, defendants admit that plaintiff has exhausted all the remedies available to him under applicable administrative procedures. Defendants deny that plaintiff has no legal remedy other than the instant action under the jurisdiction conferred by this court, inasmuch as the Court of Claims has jurisdiction to consider plaintiff's claim for back pay. Defendants further deny that any acts of theirs in connection with plaintiff's suspension and discharge were unlawful or unconstitutional. Defendants state that they are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 23.

24. Answering paragraph 24 of the complaint, defendants deny the allegations contained therein, except that defendant Secretary of the Interior admits that plaintiff's position was not officially designated as sensitive by the Department of Interior.

25. Answering paragraph 25 of the complaint, defendants deny the allegations contained therein.

26. Answering paragraph 26 of the complaint, defendants deny the allegations contained therein, except that defendant Secretary of the Interior admits that at the hearing plaintiff was queried as to his background, habits, activities, attitudes, associations, trustworthiness, reliability, and discretion, which examination included the matters set forth in the last sentence of paragraph 26 of the complaint.

27. Answering paragraph 27 of the complaint, defendants deny the allegations contained therein.

[fol. 38] 28. Answering paragraph 28 of the complaint, defendant Secretary of the Interior denies the allegations contained therein but alleges that he relied upon the whole record in the case, including confidential information.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 28.

29. Answering paragraph 29 of the complaint, defendants deny the allegations contained therein except that defendants state that they are without knowledge or information sufficient to form a belief as to what "is believed" in connection with the contents of the confidential file.

30. Answering paragraph 30 of the complaint, defendants deny the allegations contained therein except that defendant Secretary of the Interior admits that confidential information was considered in connection with the charges issued against plaintiff, and that plaintiff was not confronted with or given an opportunity to cross-examine Government informants.

31. Answering paragraph 31 of the complaint, defendants deny the allegations contained therein.

32. Answering paragraph 32 of the complaint, defendants deny the allegations contained therein except that defendants state that they are without knowledge or information sufficient to form a belief as to plaintiff's reputation or employment opportunities.

33. Answering paragraph 33 of the complaint, defendant Secretary of the Interior admits that he has refused to restore plaintiff to employment in the Department of the Interior. Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to this allegation.

Further answering the allegations of paragraph 33, defendant Commissioners deny that plaintiff's name has been listed on any civil service rolls as a security risk discharge. Defendant Secretary of the Interior states that he is with-

out knowledge or information sufficient to form a belief as to this allegation.

[fol. 39] 34. Answering paragraph 34 of the complaint, defendants deny the allegations contained therein.

35. Answering paragraph 35 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

Additional Defenses

Second Defense

The complaint fails to state a claim upon which relief may be granted.

Third Defense

The court is without jurisdiction of the subject matter of this action in that the plaintiff seeks to subject to judicial review executive action which is committed by law to the sole and exclusive discretion of the executive.

Fourth Defense

The actions of the defendants complained of herein were neither arbitrary, capricious, nor an abuse of discretion.

Fifth Defense

Even if plaintiff's discharge be held to be invalid, plaintiff may not be reinstated since he was appointed subject to a two-year employment agreement which terminated on September 10, 1954.

Wherefore, defendants pray that the complaint be dismissed with costs to the defendants.

/s/ George Cochran Doub, Assistant Attorney General, /s/ Edward H. Hickey, Attorney, Department of Justice, /s/ Donald B. MacGuineas, Attorney, Department of Justice, /s/ Beatrice M. Rosenhain, Attorney, Department of Justice.

[Certificate of Service]

[Certificate of Mailing]

[fol. 40]

IN THE UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT—Filed September 13, 1956

Come now the defendants, Fred A. Seaton, Secretary of the Interior of the United States, Philip Young, Chairman, George M. Moore, and Frederick J. Lawton, Members of the Civil Service Commission of the United States and move this Court to dismiss this action on the ground that the Court lacks jurisdiction to entertain this suit;

In the alternative, defendants move for summary judgment on the ground that there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law.

In support of this action, the Court is respectfully referred to the exhibits attached to this motion and to defendants' memorandum of points and authorities filed herewith.

/s/ George Cochran Doub, Assistant Attorney General, /s/ Edward M. Hickey, Attorney, Department of Justice, /s/ Donald B. MacGuineas, Attorney, Department of Justice, /s/ Beatrice M. Rosenhain, Attorney, Department of Justice.

EXHIBIT "A" TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

NOTIFICATION OF PERSONNEL ACTION.

1. Name:	2. Date of birth:	4. Date:
Mr. William V. Vitarelli	10-21-10	9-15-52

5. Nature of Action:	6. Effective Date:
Excepted Appointment	9-10-52

7. Civil Service or Other Legal Authority:
C.S. Reg. 6.101(h) Schedule A

[fol. 41] 8. Position Title: Education & Training Specialist

9. Service, series, Grade, Salary: GS-1710-11, $5940 p/a

10. Organizational Designations: Department of Interior, Trust Territory of the Pacific Is. Education Department.

11. Headquarters: Koror, W. Caroline Islands

12. Field or Dept'l.: Field

13. Veteran's Preference: None

14. Position Classification Action: 4088

15. Sex: Male 16. Appropriation: Govt of Trust Territory

18. Subject to C.S. Retirement Act; Yes

19. Date of Appointment Affidavits: 11-8-51

20. Legal Residence: State—Pennsylvania

21. Remarks: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or cancelled if not in accordance with all requirements.

plus 25% Territorial Post Differential as authorized by OSC in accordance with E.O. 10,000.

You are subject to a 2 year employment agreement.

This appointment does not confer competitive Civil Service Status.

Standard Form 61 completed--85 and 87 not required.

/s/ Nat Logan Smith, Personnel Director

Entrance Efficiency Rating:
Satisfactory

[fol. 42] TRUST TERRITORY OF THE PACIFIC ISLANDS
OFFICE OF THE HIGH COMMISSIONER
3845 Kilauea Avenue,
Honolulu 16, Hawaii

EMPLOYMENT AGREEMENT

Position — Education & Training Spec.
Pay — GS-11, $5940 p/a plus 25% TPD

Duty Station Koror, Western Caroline Is.

Mr. William V. Vitarelli
c/o Civil Administrator
Koror, Western Caroline Islands

By your signature to this employment agreement you agree to serve for a period of twenty-four (24) months, *or such part thereof as your services may be needed.* This period will begin the date you are entered on the payroll.

You will be allowed per diem in lieu of subsistence while you are in travel status to your duty station. If you should delay your travel for your own personal reasons, per diem claims will not be honored for that period. Per diem may be reduced or eliminated under certain other circumstances in accordance with government travel regulations.

You are entitled to expenses of transportation of your immediate family and household effects from your place of actual residence to your duty station, subject to availability of housing. The weight of your household effects may not exceed the amount posted on your Travel Authorization. While your appointment is to the position shown on the personnel action form, you are subject to transfer or reassignment to any position for which you are qualified within the geographic area of the Trust Territory, at any time during the period of this agreement, provided there is no reduction in your pay. The rate of pay under which you are appointed is subject to such adjustment as may occur at any time during the period of your employment by operation of law, promulgation of a revised schedule of wages or by reallocation of your position.

[fol. 43] Upon completion of service specified in this agreement you may either accept return transportation for you and your dependents or you may continue to serve for a longer period, and accept transportation at the close of that period.

During the period of this agreement should unforeseen emergency arise in the nature of serious illness or death of a member of your immediate family (father, mother, husband, wife, or children) which requires your immediate presence, the High Commissioner is authorized at your request to terminate your employment and furnish you with transportation to point of recruitment in the United States. The High Commissioner shall request verification of the existence of the emergency by the American Red Cross, or other equally appropriate agency.

Should your health become so impaired through no fault of your own during the period of this employment as to justify your return to the United States, based upon examination and report of a medical officer of the Trust Territory, you will be returned at the expense of the Government to the place from which appointed.

The Trust Territory of the Pacific Islands agrees that it will have no further claims on you for the funds expended under this agreement if you fulfill its terms, or are involuntarily removed without delinquency or misconduct from employment by action of the Trust Territory at any time subsequent to the date of entry on duty.

E. D. Thomas
High Commissioner
Trust Territory of the Pacific Islands

I agree that if I fail to fulfill the terms of this employment agreement by resigning, vacating the position without authority, or if I am removed for cause before the expiration of the period of this agreement, I will, upon demand, repay to the Trust Territory of the Pacific Islands a sum of money equivalent to that expended for my transportation and subsistence and transportation of dependents and cost of shipment of household effects from beginning point of travel to duty station. I authorize the Trust Territory to withhold

[fol. 44] any final pay due me to apply against or to liquidate any indebtedness arising from a violation of this employment agreement. Further, I understand and agree that in this event return transportation to the United States at Government expense will not be furnished.

/s/ William V. Vitarelli
(Signature of Appointee)

.....
(Date)

[Filed October 1, 1956]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

September 2, 1954

Personal

In the Matter of	)	
	)	
William Vincent Vitarelli,	)	FINDINGS AND FINAL
a suspended employee.	)	DETERMINATION
	)	

The above matter coming on regularly this day for final disposition, and being well advised in the premises, the Secretary of the Interior finds as follows:

1. That the information obtained on and about William Vincent Vitarelli pursuant to Executive Order 10450 was of the nature and character that justified further examination under the terms of the Executive Order and Departmental Order No. 2738.

2. In accordance therewith and by direction and authority vested in the Secretary of the Interior by the Act of August 26, 1950 (Public Law 733, 81st Congress), charges were preferred against the employee setting forth as specifically as security considerations permitted the nature of his conduct and he was suspended from employment with the Office of Territories without pay as of April 2, 1954, the

Secretary of the Interior then and there having deemed such action necessary in the interest of national security.

[fol. 45] 3. In said letter of charges and suspension, the employee was duly notified of his privilege to submit statements and affidavits to show why he should be reinstated or restored to duty. That such statements and affidavits were submitted by the employee within the time allowed and they were duly considered. Thereafter, by letter from the Secretary of the Interior dated June 11, 1954, the employee was notified that the contents of the statements and affidavits were not deemed sufficient to justify his reinstatement to duty and the matter was set for hearing on June 22, 1954.

4. That the hearing was held on said date before a duly constituted agency authority of three disinterested employees of other agencies than the Department of the Interior. The employee was present in person and represented by counsel and was fully advised of all his rights and privileges.

5. That the said hearing board thereafter considered the entire record and recommended, on August 26, 1954, "that the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security." That the recommendation addressed to the Secretary of the Interior was accompanied by the required memorandum of reasons.

6. That the case has been carefully reviewed by me and by other officers of this Department designated by me.

7. That I find it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954.

It Is, Therefore, Determined and Ordered that the employment of William Vincent Vitarelli, an employee of this Department of the Interior, be, and the same is hereby, terminated in the interest of the national security at the close of business on September 10, 1954.

[fol. 46] A copy of this order shall be sent by registered mail to the employee and the proper officials of the Department shall be notified for appropriate action in accordance with this order.

/s/ Douglas McKay
Secretary of the Interior

Date: Sept. 2, 1954

[Filed October 1, 1956]

NOTIFICATION OF PERSONNEL ACTION

1. Name: Mr. William V. Vitarelli 2. Date of Birth: 10-21-10
4. Date: 9-21-54 5. Nature of Action: Termination
6. Effective Date: 9-10-54 7. Civil Service or Other Legal Authority: C. S. Reg. 6.101(h) Schedule A
8. Position Title: Education Officer (General)
9. Service Series: GS-1710-11, $5940 p/a
10. Organizational Designations: Department of the Interior, Trust Territory of the Pacific Is., Education Department, Administrative
11. Headquarters: Koror, W. Caroline Islands
12. Field or Dept'l.: Field. 13. Veteran's Preference: None
14. Position Classification Action: PD No. 4088
15. Sex: Male 17. Appropriator: Govt. of Trust Territory
18. Subject to C.S. Retirement Act: Yes.
20. Legal Residence: Pennsylvania (State)
21. Remarks: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service

Commission. The action may be corrected or cancelled if not in accordance with all requirements.

*plus 25% TPD as authorized by the CSC in accordance with E. O. 10,000.

This action is being taken in accordance with the provisions of

Executive Order 10450.

Date of original appointment: 9-10-52

Recruited from: New York City, New York

Transportation furnished to point of recruitment at Government expense.

[fol. 47] [Filed October 10, 1956]

Affidavit of Juanita Vidi, Personnel Officer, Office of Territories, Department of the Interior, in support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment.

[Filed October 10, 1956]

I, Juanita Vidi, do hereby certify that I am Personnel Officer, Office of Territories, and that the personnel file of William Vincent Vitarelli is presently in the custody of the Office of Territories, Department of the Interior. I further certify that the Standard Form 50 attached hereto and made a part hereof is a true copy of the official document reflecting the termination of William Vincent Vitarelli from a position under the jurisdiction of the said Office of Territories.

/s/ Juanita Vidi
Personnel Officer
Office of Territories

[JURAT]

NOTIFICATION OF PERSONNEL ACTION

1. Name: Mr. William V. Vitarelli 2. Date of Birth: 10-21-10

4. Date: 9-21-54 5. Nature of Action: Termination

6. Effective Date: 9-10-54 7. Civil Service or Other Legal Authority: C.S. Reg. 6.101(h) Schedule A

8. Position Title: Education Officer (General)

9. Service, Series, Grade: GS-1710-11 $6140 p/a*

10. Organizational Designations: Department of the Interior Trust Territory of the Pacific Is. Education Department, Administrative

11. Headquarters: Koror, W. Caroline Islands

12. Field or Dept'l.: Field.

[fol. 48] 13. Veteran's Preference: None

14. Position Classification Action: PD No. 4847

15. Sex: Male 17. Appropriation: Govt of Trust Territory

18. Subject to C.S. Retirement Act: Yes

20. Legal Residence (State): Pennsylvania

21. Remarks: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or cancelled if not in accordance with all requirements.

*Plus 25% TDP as authorized by the CSC in accordance with E.O. 10,000.

Date of original appointment: 9-10-52

Recruited from: New York City, New York.

Transportation furnished to point of recruitment at Government expense.

This Form 50 is a revision of and replaces the original bearing the same date.

Entrance Performance Rating: Excepted Status

[Filed October 10, 1956]

AFFIDAVIT

City of Washington:
District of Columbia: ss

William C. Hull, Executive Assistant to the United States Civil Service Commissioners, being first duly sworn according to law deposes and says:

1. That he has legal custody and control of the records of the Civil Service Commission.

2. That all records of the said Commission have been expunged of all adverse findings made with respect to Mr. [fol. 49] William Vincent Vitarelli under Executive Order 10450.

/s/ William C. Hull

[JURAT]

IN THE UNITED STATES DISTRICT COURT

Excerpts of Proceedings

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well, what disturbs me about the thing is that if he could be separated from the service simply upon the direction of the Secretary of the Interior, how this Court can order that he be reappointed or reemployed.

Mr. Hynning: I think this Court can order him reinstated or restored to duty. I think the Secretary of the Interior the next day can terminate him or that same day; but that is a termination, sir, that speaks as of that day, not a termination that speaks of September, 1954.

Now in the Haynes case, the court was dealing with a probation employee. It is true that the Government made the argument in its petition for rehearing to the Court of Appeals that if had misread the law, in the light of Cole v. Young, but that argument didn't persuade the Court of Appeals as recently, I believe, as September of this year, after Cole v. Young had been decided and after the Government had argued that its decision was in error. The court let its earlier decision stand. So I submit that Haynes v. Thomas is the law for this circuit, and under that case, a probationary employee, who, of course, could be let go for no reason at all—for no reason at all—during that period, was ordered reinstated.

I submit that a Schedule A employee who was terminated with the wrong procedure and the wrong reasons, and with dreadful consequences to himself and his family, who is being held up with "a badge of infamy," is entitled to reinstatement if the original proceeding was unlawful.

[fol. 50] The Court: Well, I am not persuaded that this Court has the right to direct the Government to reinstate someone who could clearly be separated from the service. That is the point that bothers me.

Mr. Hynning: He could be separated after he was restored. Now the Government has conceded that his original removal was unauthorized. They have bungled——

Mr. MacGuineas: I am sorry, that is not a correct statement of my position.

The Court: No, I don't think they have conceded it was unauthorized. They have conceded it was not authorized by the Security Act, but they haven't conceded that they didn't have a right to except him from the service.

Mr. Hynning: I accept the correction. I should have said it was not authorized under the authority that was purported to be used.

The Court: That, I think, is correct.

Mr. Hynning: Now they bungled at reaching the next conclusion, that if the authority they used and the authority that has been mentioned in this case up until September of this year is the improper authority, I think it follows, as a matter of logic that that removal was unauthorized and, therefore, unlawful. The fact that they had some other

authority which they could have used but didn't, is conjectural, hypothetical and, as they have said, immaterial in this case.

Now that appears in their document in answer to my argument in favor of discovery. On that point I am in complete accord. The fact that they had the authority to act in a lawful manner, I think, is irrelevant if they didn't so act. I think this Court is concerned only with what happened when Dr. Vitarelli was removed, and what happened there was that he was removed under an authority which did not exist and a procedure which was unauthorized.

[fol. 51]. The Court: I am sympathetic somewhat to the plaintiff in this case, but I really don't see how this Court has the right to say that he shall be reinstated when the Secretary had the right to terminate his services, even if he terminated them for a wrong reason.

Mr. Hynning. Well, sir, it seems to me that that was the precise issue confronting the Court of Appeals for this circuit in Haynes v. Thomas.

The Court: Haynes v. Thomas was decided before Cole v. Young.

* * * * * * *

The Court: It does look to me like counsel could get together on the wording of an order that would carry into effect my ruling and at the same time point out that the removal—he was removed as a security risk, wasn't he?

Mr. MacGuineas: Yes, that is my point, and I don't want to give the Court of Appeals, if the case gets there, any contrary impression from any wording of an order of Your Honor's.

The Court: Well, he couldn't be removed as a security risk under the provisions that he was removed under.

Mr. MacGuineas: The authority for doing so was not the act of 1950, but there was authority for doing that under the general dismissal authority. That was our whole proposition on the case, which I understand Your Honor agreed with. In other words, under the general power of removal, he could be dismissed for any reason whatever, be it security or non-security or anything.

Mr. Hynning: I agree completely with counsel for the Government that that could have been done, but it wasn't.

As I understood the ruling of this Court, it was that he was an employee at will and that an employee at will, removed for the wrong reason and the wrong procedure, still is without a remedy, as far as reinstatement is concerned, because if he were restored, he could be fired that very same day.

[fol. 52] The Court: That is right.

Mr. Hynning: That is what I understood to be the rationale of this Court's ruling. I have endeavored to state that.

* * * * * * *

IN THE UNITED STATES DISTRICT COURT

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ETC.—Filed October 29, 1956

This cause having been heard on cross motions of plaintiff and defendants for summary judgment; and it appearing that the removal of plaintiff as a "security risk" under the Act of August 26, 1950 (5 U. S. C. 22-1) has been conceded by the defendants not to have been authorized under that act; that the defendants have taken all practical steps, short of reinstating plaintiff or giving him back pay, to remove the stigma, if any, which may have resulted from his removal by expunging from the records of the Department of the Interior and the Civil Service Commission all adverse statements with respect to plaintiff as a "security risk" under Executive Order 10450; that the position to which plaintiff seeks reinstatement was and is a "Schedule A" position, which is excepted from the competitive civil service and from which plaintiff could be summarily removed with or without cause under the general authority of the executive branch to appoint and remove employees excepted from the competitive civil service; and that this Court cannot order the reinstatement of plaintiff whose tenure, as a "Schedule A" employee, is only at the will of the employing Government;

Now, Therefore, It Is Hereby Ordered that plaintiff's motion for summary judgment is denied; defendants' motion for summary judgment is granted; and the complaint is hereby dismissed.

/s/ James W. Morris, District Judge.

Dated: October 29, 1956

Seen: /s/ Clifford J. Hynning, /s/ D. M. MacGuineas.

[fol. 53] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13702

WILLIAM VINCENT VITARELLI, Appellant,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL., Appellees.

Appeal from the United States District Court
for the District of Columbia

Mr. Clifford J. Hynning for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom Assistant Attorney General Doub, and Mr. Paul A. Sweeney, Attorney, Department of Justice, were on the brief, for appellees.

Before FAHY, WASHINGTON and DANAHER, Circuit Judges.

OPINION—Decided February 13, 1958

WASHINGTON, Circuit Judge: This is a suit by a former Government employee, seeking reinstatement and declaratory relief.

Plaintiff-appellant occupied a position in the Department of the Interior, designated "Education and Training Specialist," which was excepted from the classified civil service. In early 1954, after some three years of employment, he was suspended by the Secretary of the Interior on charges (among other things) (1) that he was a member of, affili- [fol. 54] ated with, or in sympathetic association with, the Communist Party, (2) that his behavior, activities and associations tended to show that he was not reliable or trustworthy, and (3) that he had "deliberately misrepresented, falsified or omitted material facts" in answering, under oath, questions addressed to him in 1952 by the Interior Department Loyalty Board. The charges were purportedly made pursuant to the Act of August 26, 1950, 5 U.S.C. § 22-1 (1952), and Executive Order No. 10,450, 18 Fed. Reg. 2489 (1953). Plaintiff-appellant filed an answer, together with some forty-four affidavits. He was given a hearing before a Security Hearing Board. Appellant was present in person, and had the services of counsel. He was not confronted with any witnesses. Certain confidential information was not disclosed to him. At the hearing, the Government attorney stated that appellant was not charged with disloyalty, and that the "question is only whether he is a security risk." Some weeks after the hearing, the Secretary of the Interior made findings sustaining the charges, and dismissed appellant. A rehearing was granted, and additional testimony taken. Reinstatement, however, was refused. Suit was then commenced in the District Court. The Government, as explained in the concluding paragraph of this opinion, thereafter issued a new notice of termination of appellant's employment, and expunged its records of adverse findings. Summary judgment was requested by the Government, and granted. This appeal followed.

Appellant's principal contention is that he must be reinstated because—as the Government admits—the position he occupied was not a sensitive one, and accordingly the Act of 1950 and Executive Order No. 10,450 could have no application to him, under the doctrine of *Cole* v. *Young*, 351 U.S. 536 (1956). The question is, then, whether *Cole* requires his reinstatement.

The decision of the Supreme Court in *Cole* was based on the traditional responsibility of the courts to insure that [fol. 55] Government employees sought to be dismissed are given the benefit of all procedural protections required by statute or regulation.[1] The Court laid down no general prohibition of dismissals on security or loyalty grounds. On the contrary, the Court said:

> "In interpreting the 1950 Act, it is important to note that the Act is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-LaFollette and Veterans' Preference Acts—authorize dismissals for 'such cause as will promote the efficiency of the service,' and the ground which we conclude was the basis for petitioner's discharge here—a reasonable doubt as to his loyalty—was recognized as a 'cause' for dismissal under those procedures as early as 1942. . . . Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." (pp. 543-44) (Emphasis in original.)

The inquiry in *Cole* was, therefore, a procedural one. The plaintiff in that case was a veteran. Notwithstanding that fact he was denied the protections and procedures of the Veterans' Preference Act. The Supreme Court held

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[1] See also Service v. Dulles, 354 U.S. 363 (1957) (non-compliance with regulation); Peters v. Hobby, 349 U.S. 331 (1955) (non-compliance with Executive Order No. 9,835). For examples in this court see Kerr v. Barnes, 100 U.S.App.D.C. 51, 242 F.2d 24 (1956); Kutcher v. Higley, 98 U.S.App.D.C. 278, 235 F.2d 505 (1956); Haynes v. Thomas, 98 U.S.App.D.C. 131, 232 F.2d 688 (1956); Burrell v. Martin, 98 U.S.App.D.C. 33, 232 F.2d 33 (1955); Flanagan v. Young, 97 U.S.App.D.C. 119, 228 F.2d 466 (1955); Mulligan v. Andrews, 93 U.S.App.D.C. 375, 211 F.2d 28 (1954); Money v. Anderson, 93 U.S.App.D.C. 130, 208 F.2d 34 (1953). See also Powell v. Brannan, 91 U.S.App.D.C. 16, 196 F.2d 871 (1952), and cases cited.

that he should have been given the benefits of that Act and [fol. 56] remanded the case to the District Court for appropriate proceedings. Similarly, in *Service* v. *Dulles*, 354 U.S. 363 (1957), the dismissed employee was an officer in the Foreign Service of the United States "and as such was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U.S.C. § 801, *et seq.*" 354 U.S. 371 at n. 12. As the Supreme Court pointed out, the procedures required by that Act were not afforded to him. When the Supreme Court held that the action which the Government had taken in an effort to dismiss Service was invalid, it thus became clear (as was true in *Cole*) that if the Government wished to press its charges once more it must do so under the required statutory procedure. In the case at bar the petitioner had no prescribed tenure of office and is not a veteran, nor a member of the Foreign Service, nor in any other specially-protected group. He is not a member of the classified civil service and accordingly is not entitled to such protection as the Lloyd-LaFollette Act gives. 37 Stat. 555 (1912), 5 U.S.C. § 652 (1932). Nor, of course, is he entitled to the procedural protections provided by the Act of August 26, 1950, which has no application to him.[2]

Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds. *Wieman* v. *Updegraff*, 344 U.S. 183, 191, 192 (1952); *McGinty* v. *Brownell*, — U.S.App.D.C. —, 249 F.2d 124 (1957). But [fol. 57] no such dismissal occurred here. Dismissal on loyalty or security grounds certainly is not unconstitutional *per se;*

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[2] Where the Executive extended—by Executive Order No. 10,450—the provisions of the 1950 Act to employees in sensitive positions who might not, under that Act standing alone, be entitled to the procedural protections outlined in the Executive Order, this court held the Government to observance of those protections. Haynes v. Thomas, *supra* note 1 (probationary employee in Navy Department held entitled to protections of Executive Order No. 10,450). But where, as here, the employee is not in a position declared sensitive, the 1950 Act and the Executive Order are inapplicable to him, under the rule in *Cole*. The decision in Service v. Dulles, *supra* note 1, relied on by appellant, is not pertinent unless statutes or regulations "were indeed applicable and were violated." 354 U.S. at 373.

the Supreme Court's language in *Cole* refutes any contention of that sort.[3] And the treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing. This was more than he was entitled to under any statute or regulation applicable to persons of his employment status.

It is true, as appellant urges, that an administrative order "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).[4] But, as the Supreme Court made clear in the second *Chenery* case, the courts will disturb the agency's conclusion "only if it lacks *any* rational and statutory foundation." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). (Emphasis supplied.) In this case there was clearly a "rational" foundation for the Secretary's [fol. 58] dismissal of appellant. There was also a sufficient "statutory" foundation—the constitutional power of the Executive to dismiss subordinates: a power not limited in the present instance by statute or regulation.[5]

For these reasons, we find that appellant was legally discharged, even though the proceedings were improperly

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[3] This court has said: "It is our clear opinion that the President, *absent congressional restriction*, may remove from Government service any person of whose loyalty he is not completely convinced." Bailey v. Richardson, 86 U.S.App.D.C. 248, 267, 182 F.2d 46, 65, *affirmed by an equally-divided court*, 341 U.S. 918 (1951). (Emphasis added.)

In *Cole* and *Service* the Supreme Court held that there were "congressional restrictions" on dismissal which the Government had failed to observe. In the instant case there were no such restrictions.

[4] We recently applied that rule where the Secretary of State relied exclusively on a particular regulation in denying a passport to an applicant, but failed to make the findings which that regulation required. Boudin v. Dulles, 98 U.S.App.D.C. 305, 235 F.2d 532 (1956).

[5] See footnotes 2 and 3, *supra*.

labelled as being brought under the authority of the Act of 1950 and Executive Order No. 10450. He was not deprived—in contrast to the situation in *Cole* and *Service*—of any procedural right or protection to which he was entitled. It may be noted, too, that one of the grounds of dismissal furnishes a clear basis for the Secretary's action, quite apart from the questions raised by the appellant. Charge 3 against appellant reads as follows:

> "3. Your behavior, activities and associations tend to show that *you are not reliable or trustworthy*, and the facts above alleged furnish reason to believe that *you have deliberately misrepresented, falsified or omitted material facts* in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security." (Emphasis added.)

The charge of untrustworthiness and deliberate misrepresentation was found by the Secretary of the Interior to have been sustained on the evidence before him.

There is no basis on which we can weigh the evidence, or conclude that the Secretary's action in dismissing appellant could not properly be rested on that ground. The power of the Executive to discharge for untrustworthiness or deliberate misrepresentation is beyond dispute, even under the here inapplicable Lloyd-LaFollette and Veterans' Preference Acts. See *Williams* v. *Cravens*, 93 U.S.App.D.C. 380, 381, 210 F.2d 874, 875, cert. denied sub nom. *Williams* [fol. 59] v. *Robbins*, 348 U.S. 819 (1954); *Kohlberg* v. *Gray*, 93 U.S.App.D.C. 97, 207 F.2d 35 (1953), cert. denied, 346 U.S. 937 (1954). And, so long as one of the grounds announced appears rational and proper, courts have refused to review the evidence or to examine the merits of the

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[1] See Devine v. Campbell, 90 U.S.App.D.C. 171 at 174, 194 F.2d 876 at 879, *cert. denied*, 344 U.S. 826 (1952). *Cf.* Kuhn v. Civil Aeronautics Board, 87 U.S.App.D.C. 130, 183 F.2d 839 (1950). The circumstance that the third ground of dismissal was intimately related to the first two grounds would seem immaterial here.

executive officer's finding.[7] It is not our function to decide whether appellant was or was not untrustworthy, or a "security risk."

An additional point remains. Appellant asserts that the Secretary's action illegally fastened upon him a "badge of infamy," which can be removed only by his reinstatement. We think, however, that the Secretary's mistaken reliance on the Act of 1950 and Executive Order No. 10,450 does not require the relief appellant asks. The record shows that appellant's notice of termination, as originally issued, stated that action was "being taken in accordance with the provisions of Executive Order 10450." But, two years later, after suit had been brought in the District Court, a new notice was issued which omitted the quoted statement. An affidavit was also filed by an official of the Civil Service Commission stating that "all records of the said Commission have been expunged of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450." We think that this voluntary action by the Government is equivalent to the maximum relief a court [fol. 60] might have been justified in granting under all the circumstances of the case. See *Peters* v. *Hobby*, 349 U.S. 331, 349 (1955); *Service* v. *Dulles*, 98 U.S.App.D.C. 268, 272, 235 F.2d 215, 219 (1956), rev'd on other grounds, 354 U.S. 363 (1957).

Affirmed.

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[7] Kent v. United States, 177 U.S. 290 (1900); Eberlein v. United States, 257 U.S. 82 (1921); Levine v. Farley, 70 App.D.C. 381, 107 F.2d 186 (1939), *cert. denied*, 308 U.S. 622 (1940); Carter v. Forrestal, 85 U.S.App.D.C. 53, 175 F.2d 364, *cert. denied*, 338 U.S. 832 (1949).

FAHY, Circuit Judge, dissenting: The original termination action of the Secretary, effective September 10, 1954, was explicitly rested by him upon Executive Order 10450,[1] which in turn rested upon the Act of August 26, 1950.[2] This appears upon the face of the Secretary's "Findings and Final Determination" and from the "Notification of Personnel Action."

I cannot read Charge 3, referred to by the majority, or any finding of the Secretary based thereon, as in any sense independent of executive Order 10450 or the Act of August 26, 1950.

It is conceded that under the decision of the Supreme Court in *Cole* v. *Young*, 351 U.S. 536, said Executive Order and Act did not authorize the Secretary's action in this case. Accordingly, the basis for the original termination disappears, and with it the validity of that termination.

On October 12, 1956, a second "Notification of Personnel Action" was delivered to appellant. This in terms purported to terminate the employment as of the date of the original termination, September 10, 1954, and was not based upon Executive Order 10450 or the Act of August 26, 1950. But this action of course could not relate back as attempted, and at most could be effective only as of the time it was taken, October 12, 1956.

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[1] 18 Fed. Reg. 2489 (1953).

[2] 64 Stat. 476, 5 U.S.C. § 22-1 (1952).

[fol. 61]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13702 January Term, 1958.

C. A. 2870-56

WILLIAM VINCENT VITARELLI, Appellant,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL., Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: FAHY, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT—February 13, 1958

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Feb. 13, 1958

Per Circuit Judge Washington.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 63] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

SUPREME COURT OF THE UNITED STATES

No. 1067, October Term, 1957

WILLIAM VINCENT VITARELLI, Petitioner,

vs.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 5, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 13th, 1958.

Earl Warren, Chief Justice of the United States.

Dated this 5th
day of May, 1958.

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 101, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 27, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 66]

SUPREME COURT OF THE UNITED STATES

No. 101, October Term, 1958

[Title omitted]

ORDER OF SUBSTITUTION—November 17, 1958

On Consideration of the motion to substitute Barbara Bates Gunderson as a party respondent in the place and stead of Christopher H. Phillips in this case,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.

November 17, 1958

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IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1057~~ 101

WILLIAM VINCENT VITARELLI, *Petitioner*

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, CHRISTOPHER H. PHILLIPS, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1957

No.

WILLIAM VINCENT VITARELLI, *Petitioner*

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, CHRISTOPHER H. PHILLIPS, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, William Vincent Vitarelli, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The memorandum of the Secretary of the Interior[1] suspending petitioner under Department Order 2738 is

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[1] This letter is not technically part of the record of the case, since it was not introduced at the trial court, but was printed as Appellant's Appendix B (R. 12-15). Specific references to the letter were made by the opinion of the Court of Appeals, 253 F. 2d 338, 340, 342, 343.

printed as Appendix B to this petition, *infra*, pp. 35-39. The "Findings and Final Determination" of respondent Secretary, dated September 2, 1954, ordering the termination of petitioner's employment "in the interest of national security," is printed at R. 44-46.[2] The order of the District Court, dated October 29, 1956, is unreported and is printed at R. 52. The opinion of the Court of Appeals is reported at 253 F. 2d 338 and is printed as Appendix C to this petition, *infra*, pp. 41-48.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

In filing his suit petitioner sought (i) a declaratory judgment that his removal by respondent Secretary as a "security risk" under the purported authority of the Act of August 26, 1950, be set aside as illegal and void and (ii) a mandatory injunction directing petitioner's reinstatement to his position as educational officer in the Department of the Interior, with all the rights incident thereto. Respondents thereupon voluntarily expunged the records of the Department of the Interior and the Civil Service Commission of "all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450." The case was heard on cross motions for summary judgment at the conclusion of which the District Judge granted summary judgment for respondents on the ground that the court could not order the reinstatement of an employee whose tenure "is only at the will of the employing Government." The Court of Ap-

[2] References to the record "(R. ——)" are to the Joint Appendix as printed in the court below (R. 11-52).

peals affirmed on the ground that the treatment accorded petitioner "was in no way arbitrary, or lacking in due process" and that he "was legally discharged, even though the proceedings were improperly labelled," and that the voluntary expunging of the records, which had already been effected, was "the maximum relief" to which petitioner was entitled. The questions presented are:

1. Whether a "security risk" removal with defamatory consequences violates petitioner's constitutional rights where made under wrongful authority or merely amounts to what the court below termed "improperly labelled" proceedings against an employee lacking statutory job rights?

2. Whether, in the latter event, a finding of "untrustworthiness" by respondent Secretary, purportedly made under his Departmental Security Regulations, survives a voluntary expunging by respondents of all records of "any adverse statements" so as to furnish a "rational" foundation for ordering petitioner's removal?

3. Whether respondent Secretary, having by his own Departmental regulations and proceedings thereunder specifically subjected petitioner to the formalities of a hearing "in the interest of the national security," furnished petitioner with (a) charges stated with sufficient specificity so as to enable petitioner, on the assumption of innocence, to prepare an adequate defense, and (b) a fair and impartial hearing free from partisanship?

4. Whether the "security risk" dismissal of a concededly loyal educator from a "non-sensitive" position—involving no element of the national security as defined in *Cole*—can be effected after the formalities of a "hearing" solely on the basis of secret reports?

5. Whether respondent Secretary, who had discharged petitioner in 1954 as a "security risk," confessedly under the wrongful authority, could discharge petitioner again

two years later (1956), after the institution of this suit, by the device of predating a second discharge paper and expunging the references to his being a "security risk," or must respondent Secretary first reinstate petitioner?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves:

(1) The Fifth Amendment to the Constitution of the United States, printed in Appendix A, *infra*, p. 26.

(2) Executive Order 10450, issued April 27, 1953, printed in Appendix A, *infra*, pp. 26-27.

(3) Department of the Interior, Order No. 2738, Security Regulations, dated November 9, 1953, which are printed in Appendix A, *infra*, pp. 28-33.

STATEMENT OF THE CASE

This case comes to this Court from the affirmance of the order of the trial court (R. 52) which granted respondents' motion for summary judgment and denied petitioner's cross motion for summary judgment. The trial court order, however, stated that respondents conceded their action was not authorized under the Act of August 26, 1950, and that respondents

> "have taken all practical steps, short of reinstating plaintiff or giving him back pay, to remove the stigma, if any, which may have resulted from his removal by expunging from the records of the Department of the Interior and the Civil Service Commission all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450."

Neither party introduced testimony in the trial court.[3]

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[3] Save for such references to a newspaper clipping (Appendix B, p. 34), the letter of charges (Appendix B, pp. 35-39); and the

Petitioner is a professional educator, holding a doctor's degree from Columbia University, who was employed by the Department of the Interior in the Education Department of the Trust Territory of the Pacific Islands, at Koror in the Palau District. Under the general employment policy of the Government for overseas personnel outside the Foreign Service, petitioner held a so-called "Schedule A" position excepted from the classified civil service, had completed his trial period, and held an "indefinite appointment." He had rendered full and completely satisfactory service in his position as education and training specialist, which he had held for some three years, had received official ratings of "satisfactory" and "excellent," and had secured many favorable commendations from his superiors. At the time of his suspension in 1954, petitioner was receiving a salary of $6,140 per year plus the 25% overseas differential. Respondents have conceded that his position at no time had been designated a "sensitive position."

Petitioner first learned of his probable suspension from the headlines of a Guam newspaper under date of March 13, 1954 (Appendix B, p. 34), which stated: "Security Probe in Trust Isles—Five Employees Will Be Ousted as 'Bad Risks,'" and listed one as a "known conscientious objector" who as "an advocate of pacificism is out of place in so sensitive and strategic an area as the Trust Territory." Thus commenced the official defamation of petitioner. While petitioner's pacificism was not subsequently cited in the charges against him, it still remained the subject of questioning at his hearing.

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transcript of the so-called hearing before the security hearing board as are necessary to explain how this case arose, the statement of the case is based on the facts of record. The essentials of the security hearing were also set forth in testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on November 23, 1955, and printed as part of its proceedings pursuant to S. Res. 94, 84th Congress, 2nd Session, pp. 653-71.

Approximately one month later, on or about April 3, 1954, petitioner received an abstract of a letter from respondent Secretary, suspending him, without at that time stating any of the charges. The full text of the letter setting forth certain charges against him (Appendix B, pp. 35-39) was received on or about April 8, 1954. Petitioner was initially denied travel authority to proceed from Koror to Washington, D. C. "at government expense unless resigning." After seeking to borrow travel funds in Koror, petitioner was later authorized to proceed to Washington for the purpose of answering the charges. He perforce left his wife and four children in Koror for many months. Petitioner filed with respondent Secretary a written answer, together with 44 affidavits concerning his loyalty and character, but was informed on June 11, 1954, that there were not "sufficient grounds to reinstate" him.

On June 22 and July 1, 1954, petitioner, together with counsel and four witnesses, appeared before a so-called security hearing board. Petitioner was not confronted with any evidence against him and did not have the right to subpoena witnesses, or to cross-examine his accusers, whoever they might be. Nor was he given the text of the statements that had allegedly been made against him. In his testimony petitioner categorically denied membership in or affiliation or sympathetic association with the Communist Party or its sympathizers and gave a complete, candid and factual explanation of the matters contained in the written charges. The security officer of the Department of the Interior conceded on the record that petitioner's loyalty was not in issue, as appears from the following exchange:

> "Mr. Olmsted [counsel for appellant]: * * * Does Mr. Armstrong [then assistant solicitor and security officer, Department of the Interior] question his loyalty to the United States?

Mr. Armstrong: No, I think I perhaps didn't elaborate my very first statement this morning sufficiently. * * * Of course, in the Oppenheimer case the board recommended to AEC to dismiss him as a security risk although they said he was perfectly loyal.

Mr. Olmsted: That is why I am asking here, is it agreed that he is perfectly loyal or should I produce some evidence that he is perfectly loyal?

Chairman Towson [who presided at hearing]: The only thing before this Board is incorporated in the letter of charges. As I recall he is not charged with disloyalty.

Mr. Armstrong: That is right. The question is only whether he is a security risk." (Transcript of hearing, pp. 175-76.)

The transcript of the hearing shows that petitioner was examined in particular on whether he thought the security program was a Republican plot to get rid of Democrats,[4] on racial equality,[5] on discrimination against Jews,[6] on whether he had "heard" of a great variety of organizations which were not listed in the letter of charges,[7] on

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[4] "Mr. Armstrong [then assistant solicitor and security officer for the Department of the Interior]: Do you think that the Security program undertaken by Executive Order 10450 is politically inspired from the Republican administration?" Transcript, p. 15.

[5] "Mr. Armstrong: What were your feelings at that time [1943] concerning race equality?" *Ibid.*, p. 24.

[6] "Mr. Armstrong: Do I interpret your statement correctly that maybe Negroes and Jews are denied some of their constitutional rights at present?" *Ibid.*, p. 32.

[7] "Mr. Armstrong: Do you recall an organization by the name of National Council for Soviet-American Friendship? * * * How about the Southern Conference for Human Welfare? * * * What is the organization called the Joint Anti-Fascist Refugee Committee? * * * Have you ever had any contact with the Negro Youth Congress? * * * How about Abraham Lincoln Brigade? * * * Did you become active in the Progressive Party in that year (1948)? * * * Have you ever heard of a magazine called

Black Mountain transcendentalism,[8] whatever that may be, on his votes for President and Vice-President,[9] on whether he was "quite hepped up over the one-world idea,[10] and whether he was "still [i. e., June, 1954] a "strong advocate of the United Nations."[11]

On September 2, 1954, respondent Secretary issued his "Findings and Final Determination" (R. 44-46) that it was "advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954," without stating which of the charges, if any, were sustained against him. Petitioner's employment was terminated as of the close of business on September 10, 1954. Standard Form 50 of the United States Civil Service Commission, entitled "Notification of Personnel Action," was issued under date of September 21, 1954 (R. 46), designating the personnel action with respect to petitioner as "TERMINATION" and "being taken in accordance with the provisions of Executive Order 10450." This completed the process of labelling petitioner a "security risk."

By petition presented to the then Undersecretary of the Interior on October 25, 1955, petitioner applied for reinstatement or a rehearing, which was denied on May

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'Cooperative Union'? * * * I was wondering whether you had ever heard of Consumers Union?" *Ibid.*, pp. 98, 100, 101, 102, 103, 112, 113.

[8] "Mr. Armstrong: Do you know what Black Mountain transcendentalism is?" *Ibid.*, p. 97.

[9] *Infra.*, p. 22.

[10] "Mr. Armstrong: The file indicates, too, that you were quite hepped up over the one-world idea at one time; is that right?" *Ibid.*, p. 131.

[11] "Mr. Armstrong: At one time, or two, you were a strong advocate of the United Nations. Are you still?" *Ibid.*, p. 132.

11, 1956. On June 12, 1956, petitioner by his attorney made a written demand upon respondent Secretary to restore him to duty forthwith in accordance with the decision of this Court in Cole v. Young, 351 U.S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956), but respondent Secretary failed to comply with this demand, whereupon petitioner brought action in the United States District Court for the District of Columbia on July 10, 1956 (R. 10-22).

Pursuant to the Rules of Civil Procedure, petitioner gave notice to respondents for the taking of oral depositions of certain officials of the Department of the Interior and the Civil Service Commission, listing specific matters of inquiry as peculiarly within the knowledge of respondents. The scope of the discovery and the opposing reasons were, *inter alia*, set forth by petitioner and respondents as follows:

A. Petitioner's discovery

7. Why was not plaintiff simply removed without charges, without procedures and without infamy in view of his lack of competitive status under a Schedule A appointment?

8. Why did defendant Secretary insist upon imposing "a badge of infamy" on plaintiff by making a finding that the employment of plaintiff be "terminated in the interest of the national security" under the purported authority of E.O. 10450 and the Act of August 26, 1950?

B. Respondents' reasons for opposing discovery

7. and 8. . . . These questions clearly relate to matters which are hypothetical and immaterial. The only relevant legal issue herein is whether the procedures in fact employed by the defendant Secretary in accomplishing plaintiff's discharge were legal and valid. Neither the existence of any other procedure which could have been used to discharge plaintiff nor the reason why it was not in fact employed can have any possible relevance herein.

On October 1, 1956, noting the above quoted language of respondents in 7 and 8 "on the understanding that this is a concession of record and binds the Defendants not to depart from that position," petitioner thereby withdrew his opposition to respondents' motion for a stay of discovery proceedings and filed a cross motion for summary judgment.

On October 16, 1956, the case was heard on cross motions for summary judgment, at the conclusion of which United States District Judge James W. Morris ruled that he would grant summary judgment for the respondents because he questioned whether he possessed the power to order the reinstatement of a governmental employee whose tenure was at the will of the employing department and as such excepted from the protection available to employees in the classified civil service (R. 49-52). The final order was issued on October 29, 1956 (R. 52). The Court of Appeals affirmed the case on February 13, 1958 (Appendix C). On May 5, 1958, Chief Justice Warren issued an order ex parte extending the time to file petition for certiorari until June 13, 1958.

REASONS FOR GRANTING THE WRIT

The Court of Appeals (Appendix C) has held: (a) that even though a governmental employee lacking statutory job protection is "entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds," the treatment of petitioner by respondent Secretary "was in no way arbitrary or lacking in due process" and that petitioner had been "legally discharged even though the proceedings were improperly labelled" as a security proceeding; (b) that one of the grounds of dismissal furnished a "clear basis" for the Secretary's action in removing petitioner, namely untrustworthiness, and that courts properly refuse to review the evidence or to examine the merits of an executive finding of untrustworthi-

ness; (c) that a charge of untrustworthiness survives the voluntary expunging from the record of "any adverse findings" under a security proceeding; and (d) that the maximum relief to which petitioner would be entitled would be the expunging of the record, which had already occurred, and that petitioner in no event would be entitled to reinstatement.

The dissent by Judge Fahy found that the charge of untrustworthiness could not be be read "as in any sense independent" of the expunged charges which had been made under E. O. 10450 and the Act of August 26, 1950; that under the ruling of this Court in *Cole* "the basis for the original termination disappears, and with it the validity of that termination"; and that the second termination notice "could not relate back as attempted."

The majority result is a decision in conflict with Service v. Dulles, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957), which resulted in the reinstatement[12] of a governmental employee dismissed under procedure which was in conflict with Departmental regulations; with Perkins v. Elg, 307 U.S. 325, 83 L. Ed. 1320, 59 S. Ct. 884 (1930), which held that executive discretion must be exercised in accordance with the agency's own regulations; with Cole v. Young, 351 U.S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956), which held that a governmental employee in a "non-sensitive" position could not be summarily removed on security grounds under the Act of August 26, 1950; with Parker v. Lester, 227 F. 2d 708 (9th Cir., 1955), which held that "perpetuating a doubt-

[12] The court below cited its own decision in *Service* to support its refusal to direct petitioner's reinstatement, asserting that its decision was reversed on "other grounds" by this Court. The fact of the matter is that this Court reversed the Court of Appeals and remanded the case to the District Court, with the result that Service was reinstated and is again an official of the Department of State.

ful system of secret informers . . . cannot justify an abandonment here of the ancient standards of due process"; and with Simmons v. United States, 348 U.S. 397, 99 L. Ed. 453, 75 S. Ct. 397 (1955), which held that a hearing should not "be conducted on the level of a game of blindman's bluff."

At the outset petitioner readily concedes that, as an overseas "Schedule A" employee, he held a position excepted from the classified civil service and accordingly lacked tenure under the Lloyd-LaFollette Act, that he has no rights under the Veterans' Preference Act, and is not in any manner covered by the Foreign Service Act. Absent the security regulations of the Department of the Interior, petitioner would not be disposed to question the authority of respondent Secretary to have removed him without the filing of charges, without hearing or other procedures and—be it carefully noted—*without infamy* to himself or to his family.

This case does not present any question of the power of management to discharge an employee considered unsuitable without charges or a hearing. Such an employee lacking statutory job protection may be reassigned, demoted, or discharged for no reasons at all. Respondent Secretary could have done so in this case. He did not do so. What respondent Secretary did was to initiate a formidable proceeding for the proclaimed purpose of determining whether petitioner's removal was required by "national security"—an adjudication of status. The issue here is whether respondent Secretary can defame and stigmatize petitioner as a threat to the security of his country through following the formalities of an adjudicatory proceeding without observing the most elementary requirements of a fair hearing.

Nor does this case involve the right of respondent Secretary to use secret information in the course of personnel management. The issue here is whether respond-

ent Secretary, while relying on the formalities of a security hearing, can use confidential information from anonymous informants for the purpose of condemning petitioner as a *security risk* in a situation where whatever security interests may have been involved could have been readily satisfied by simply dismissing petitioner without charges and without the formalities of a hearing.

Our reasons in detail are:

1. *The defamatory dismissal of petitioner as a security risk under the wrongful authority and without any basis of record was no mere error in "labelling."* The constitutional issue presented relates to rights of an American educator to pursue his profession of teaching without being "improperly labelled" with a "badge of infamy" through removal as a "security risk" by respondent Secretary under the wrongful application of the authority of the Act of August 26, 1950, and E.O. 10450. Under *Cole* this Court held that the removal of a governmental employee from a non-sensitive position is beyond the authority of the Act of August 26, 1950. Respondents argued, and the court below agreed, that *Cole* does not avail petitioner because he was outside the classified civil service and accordingly had no statutory rights which were violated by his removal. While petitioner may lack statutory rights in the protection of his job, he has a constitutional right not to be defamed without lawful authority.

The right of a professional man to follow his calling, for which he has been trained and recognized by the competent authorities, is a property right entitled to due-process protection by the courts, unless he has forfeited such protection by some act or habit that would justifiably bar him from the educational field. Truax v. Raich, 239 U.S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915). These due-process standards and procedures have been applied to

the revocation of professional licenses of lawyers, seamen, insurance agents, and professional bondsmen.[13]

This Court has repeatedly recognized that "substantial rights affecting the lives and property of citizens are at stake" where a public employee has been removed on grounds of disloyalty or security. Peters v. Hobby, 349 U.S. 331, 347; 99 L. Ed. 1129, 75 S. Ct. 790 (1955). Dr. Peters himself held a "Schedule A" appointment, it is noted by this Court (note 24 on p. 347), the precise type of appointment held by the petitioner here.[14] In recognizing that "a badge of infamy" attaches to a public employee dismissed on grounds of disloyalty, *Peters* was but following the earlier decision of this Court in Wieman v. Updegraff, 344 U.S. 183, 190-191; 97 L. Ed. 216, 73 S. Ct. 215 (1952). In the same term with *Cole*, which involved the rights of a Federal civil servant, this Court also decided Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 100 L. Ed. 692, 76 S. Ct. 637 (1956), where the summary dismissal of a professor of German in Brooklyn College on the ground that he had used the Fifth Amendment at a hearing before a Congressional committee was held invalid.

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[13] *In re Isserman*, 348 U.S. 1, 99 L. Ed. 32, 75 S. Ct. 6 (1954); *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir. 1955); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 70 L. Ed. 494, 46 S. Ct. 215 (1925); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 (1957); *Columbia Auto Loan Co.* v. *Jordan*, 90 U.S. App. D.C. 222, 196 F. 2d 568 (1952); *In re Carter*, 89 U.S. App. D.C. 310, 192 F. 2d 15 (1951), cert. den. 342 U.S. 862, 96 L. Ed. 648, 72 S. Ct. 89.

[14] Dr. Peters held a term appointment which by its own terms had expired at the time of this Court's decision, which rendered moot the matter of reinstatement, and his compensation was only for time actually worked, which rendered moot the question of back pay. Here petitioner, however, held an indefinite appointment of a full-time position.

Even though it may be conceded as an abstract proposition that petitioner may have had no constitutional right to work for the Department of the Interior, it is submitted that having once been so employed as an educational officer, he thereby acquired a substantive right of property in "a species of tenure and cannot be capriciously excluded and thereby injured financially and professionally." Alpert v. Board of Governors, 286 App. Div. 542, 145 N.Y.S. 2d 534 (1955).

The court below recognized the force of the above decisions when it concluded that "Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds." But then it went on to hold that "no such dismissal occurred here" and that the "treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing." The court below relied [15] heavily on its own decision in Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F.2d 46, affirmed by an equally divided Court, 341 U.S. 918, 95 L. Ed. 1352, 71 S. Ct. 669 (1951). It also pointed out that in both *Cole* and *Service* this Court had based its decision on "Congressional restrictions" on dismissals, whereas in this case there were no such restrictions applicable to the removal of petitioner. In effect, the court below held that petitioner's constitutional rights, unless implemented by some Congressional restriction, were not violated by his removal as a security risk.

The affirmation of *Bailey* by an equal division of this Court was done on premises which have since been clearly rejected by this Court in *Peters* and *Wieman*. The cornerstone of *Bailey* was the ruling that "the due process clause does not apply to the holding of a government

[15] See court's "emphasis added" in its note 3.

office" and that there is no basic right to government employ (182 F. 2d 57, 60-61), but *Peters* and *Wieman* clearly held to the contrary. Nor did *Bailey* deem the stigma of disloyalty discharge distinctive from discharge on other grounds (at p. 64), while this Court has "emphasized the unique and terrible consequences following from an adjudication that an employee is disloyal or that his continued employment will adversely affect the national security." Unless *Bailey* is explicitly overruled, it will remain at the core of the constitutional problem in security cases, especially in lower courts, which have been prone to let justice in this area depend upon appeal to this Court.

2. *Respondents, having voluntarily expunged the record of all statements adverse to petitioner, lacked a rational foundation for finding petitioner untrustworthy.* Relying on second *Chenery* that an agency's conclusion will be disturbed "only if it lacks a rational and statutory foundation," Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 207, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947), the court below found the dismissal of petitioner by respondent Secretary had both a "rational" foundation and a "sufficient 'statutory' foundation—the constitutional power of the executive to dismiss subordinates: a power not limited in the present instant by statute or regulation." Petitioner was held to have been legally discharged because, *inter alia* one of the grounds for dismissal "furnishes a clear basis for the Secretary's action"—the charge that was set forth in numbered paragraph 3 (relating to untrustworthiness) of the letter of charges (Appendix B, p. 38). A charge of untrustworthiness is sufficient to justify a discharge "even under the here inapplicable Lloyd-LaFollette and Veterans Acts." In its footnote 6 the court below noted, "The circumstance that the third ground of dismissal was intimately related to the first two [security] grounds would seem immaterial here." In the dissent, however, Judge Fahy pointed out that charge 3 or any finding

based thereon could not be read independently of Executive Order 10450 or the Act of August 26, 1950.

There is a very serious defect in this holding by the court below, for respondent Secretary's finding of untrustworthiness is contained in a document that has been voluntarily expunged by the respondents, as the court itself noted (pp. 42, 47) "of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450."[16] How then, could the court below say that the charge of untrustworthiness and deliberate misrepresentation was found by the Secretary of the Interior "to have been sustained on the evidence before him" when "all adverse findings" had already been "expunged"—and that "voluntarily" by respondents?

3. *Respondent Secretary limited his authority to remove petitioner as a security risk only in accordance with his own Departmental security regulations.* The Departmental security regulations (Appendix A, pp. 28-33) provided that any employee charged on security grounds would be removed exclusively pursuant to the procedures of those regulations, as appears clear from Secs. 1 and 3, which state that *all* persons in the Department shall meet the minimum requirements of national security; from Sec. 6(c), which expressly exempts temporary and intermittent employees; and from Sec. 13 relating to the termination of temporary or probationary or trial employees. The implication is clear beyond any doubt that *all*[17] other employees, whether holding permanent or in-

[16] A mere reading of paragraph 3 shows plainly its origin—namely, E.O. 10450, §(8)(i) and (ii) which list "any behavior, activities or associations which tend to show that the individual is not reliable or trustworthy," and "any deliberate misrepresentation, falsifications, or omission of material facts."

[17] This was the theory not only of the Department of the Interior but of the entire Executive Branch under E.O. 10450 until this Court decided otherwise in *Cole*, and was once the prevailing theory of the court below. Cole v. Young, 96 U.S. App. D. C. 379, 226 F. 2d 337 (1955).

definite appointments, were subject to the Departmental security regulations.

From the above recital it must be clear beyond any cavil that respondent Secretary—whatever his authority might have been in the absence of these Departmental security regulations—had limited himself in effecting the removal of any employee on security grounds to effect such removal only according to the procedural safeguards of those regulations. In the words of this Court in *Service*, "Having done so he could not, so long as the regulations remain unchanged, proceed without regard to them." Contrary to the proceedings followed against Service, petitioner was informed by respondent Secretary that his case was being *exclusively* considered under the Departmental security regulations. Every contemporaneous official statement with respect to the termination of petitioner's employment denotes that the determination to remove him and the termination itself were made under the security order and no other authority.

As a governmental employee who had satisfactorily served his probational period, petitioner under Departmental security regulations was entitled upon his suspension "in the interest of national security" to:

(1) "A written statement of charges . . . as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit . . . ." [§ 15(a)]; and

(2) "A hearing before a security hearing board [which shall conduct hearings] in an orderly manner . . . and insure the employee of a full and fair consideration of his case . . . [including the right] to cross-examine any witness offered in support of the charges." [§ 21(a) and (c)].

A. *The security charges were not sufficiently specific to enable petitioner, on the assumption of innocence, to*

defend himself. As already related, *supra*, p. 6, it was conceded on the record of the security hearing that petitioner is and has always been loyal to the government of the United States. That being so, the only charges remaining against petitioner were as follows (Appendix B, pp. 37-38):

> "That in fact your associations with the said F—— were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W—— were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that both the said F—— and the said W—— were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations
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> • • • •
>
> "3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and that these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security."

Elemental fairness requires that charges preferred for removal must be "specific enough to provide a fair opportunity for refutation by the innocent who have no knowledge of the conduct charged, as well as the guilty who do possess such knowledge." Money v. Anderson, 93 U.S. App. D.C. 226, 208 F. 2d 34, 37-38 (1953).[18] A charge that petitioner had not told the entire truth concerning his relationship with certain individuals is clearly

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[18] Followed in Manning v. Stevens, 208 F. 2d 827 (D.C., 1953). Also see Robert J. Morgan, "Federal Loyalty-Security Removals, 1946-1956." 36 Nebraska Law Review 412-46 (1951).

not sufficiently specific if it does not specify the times, places, and type of "close association" that have allegedly been omitted. If the accused has told the truth in stating his entire knowledge of the situation, how can he respond to a charge that he has left out some unstated matter, if that matter does not exist?

B. *A concededly loyal educator can not be removed from a non-sensitive position after a hearing solely upon the basis of undisclosed information furnished by secret informants.* There is no dispute that the security hearing board in recommending adversely concerning petitioner relied upon undisclosed information furnished by secret informants, and that respondent Secretary relied thereon in removing petitioner.

It is a constitutional principle that ". . . there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 227 U.S. 88, 93, 57 L. Ed. 431, 33 S. Ct. 185 (1913). This Court has repeatedly held that "where the disclosure of an informant's identity, or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro v. United States, 353 U.S. 53, 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957); Jencks v. United States, 353 U.S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957). While these cases involved criminal prosecutions, they stand broadly for the proposition that a party threatened with the deprivation of substantial rights, as is any party involved in a proceeding which may result in his being labelled a "security risk," is entitled to the fullest opportunity to defend himself.

This is no new doctrine. In Morgan v. The United States, 304 U.S. 1, 82 L. Ed. 1129, 58 S. Ct. 773 (1938),

this Court said, "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." In the absence of findings of fact,[19] there is no way to know which of several conflicting official explanations led to petitioner's removal (R. 25-26) whether it was his pacifism as publicly stated to the press, whether it was based on the charges as stated in respondent Secretary's final determination, whether it was based upon some undisclosed charges as stated by the solicitor of the Department of the Interior, or whether it was based on petitioner's alleged "lack of common sense" as stated by the personnel officer, or even upon no charges at all.

A new book on *The Law of the Civil Service* summarizes Federal and State court decisions on the nature of the hearing to be afforded a civil servant as follows:

> "Basically what is generally required to come within the purview of a fair hearing is that every reasonable opportunity must be granted to the accused employee to defend himself against the charges. He must be permitted to testify in his own behalf, be permitted to be represented by counsel where he wishes to, have his own witnesses testify and cross-examine any witnesses against him. It is not enough to include in the record of the hearing statements of witnesses as to what they would have testified were they present, or accept such statements in lieu of testimony; nor does giving the accused employee an opportunity at such hearing to make a statement satisfy the requirements of a formal hearing." H. Eliot Kaplan, *The Law of the Civil Service* (1958), pp. 234-235.

C. *The so-called hearing was not a fair hearing.* On the face of the transcript of hearing (*supra*, pp. 7-8), it is

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[19] See Mulligan v. Andrews, 93 U.S. App. D.C. 381, 211 F. 2d 28, 30, 31 (1954), and Kutcher v. Higley, 98 U.S. App. D.C. 278, 235 F. 2d 505 (1956).

abundantly evident that the so-called security hearing board and security officer wandered far afield, without any discernible standards of relevance or materiality, from the matter set forth in the letter of charges. Probably the most colorful illustration of the kind of hearing afforded petitioner in 1954 is given in the following exchanges with respect to his votes for President in 1940 and 1948:

> "Mr. Armstrong [assistant solicitor and security officer for the Department of the Interior]: I think you indicated in an answer or a reply to an interrogatory that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace?
> Mr. Vitarelli: That is correct.
> Mr. Armstrong: Norman Thomas was one of those perennial candidates on the Socialist ticket for President.
> Mr. Vitarelli: That is right.
> Mr. Armstrong: How many times did you vote for him if you care to say?
> Mr. Vitarelli: I never voted for Norman Thomas that I remember. I may have been in favor of a lot of his policies, but I don't remember voting for Norman Thomas.
> Mr. Armstrong: How about Henry Wallace?
> Mr. Vitarelli: I voted for Henry Wallace once.
> Mr. Armstrong: Back in 1948?
> Mr. Vitarelli: That is correct.
> Chairman Towson [Chairman of the security hearing board]: Just one question on that. Did you not vote for Henry Wallace when he was a candidate for vice-president?
> Mr. Vitarelli: Yes, I did.
> Chairman Towson: Then you voted for him once more, more than once?
> Mr. Vitarelli: That is true. I voted for the Roosevelt New Deal regime of which he was a member; that is true."

Thus did the security hearing board chairman test petitioner's trustworthiness in having stated under oath that he had once voted for Wallace!

4. *Where the basis contemporaneously used to remove petitioner legally fails, as here conceded, the removal itself fails, and petitioner is entitled to reinstatement, notwithstanding his lack of statutory job protection.*

Not until the government's answer and supporting memorandum was filed in the District Court in 1956 was there any suggestion that petitioner was removed as a "Schedule A" employee independently of the Executive Order and the Departmental security regulations under which the removal as a security risk was purportedly made in 1954. Respondents' suggestion, moreover, is squarely contradicted by every relevant word of the record as contemporaneously made and flies in the teeth of every document signed by respondents with respect to the termination of petitioner in 1954. Whether or not the Secretary of the Interior *could* otherwise have removed petitioner without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend the procedural protection of the Departmental security regulations.

It is well established in law that where an administrative agency purports to act under certain authority or standards, its actions must be weighed in accordance with such announced authority or standards. Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 87, 95, 87 L. Ed. 626, 63 S. Ct. 454 (1943). But executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the District Court. Perkins v. Elg, 307 U.S. 325, 83 L. Ed. 1320, 59 S. Ct. 884 (1939).

It is now agreed by all parties that respondent Secretary lacked the legal authority to act under that Executive Order or the Act of August 26, 1950, inasmuch as petitioner's position had never been classified as a "sensitive position." It necessarily follows that the removal of peti-

tioner was unlawful under the authority used in fact. Nor can the removal be defended at this time on the *conjectural*[20] grounds that respondent Secretary could have removed petitioner as a "Schedule A" employee and that removal would not have been reviewable in court. The fact of the matter is that respondent Secretary never did so so long as petitioner was an employee of that Department. Neither logic nor justice should bar petitioner's reinstatement because he lacks civil-service tenure. The predating of Form 50 in 1956 is wholly without any legal effect, for petitioner was not then an employee of the Department of the Interior. Not being an employee, he could obviously not be discharged.

CONCLUSION

In removing petitioner, the Secretary of the Interior acted unjustly, arbitrarily, and unlawfully. Petitioner has been subjected to an intensive inquisition into his personal affairs. His professional reputation has been so tarred that he has been unable to find a job in teaching.

The issues presented on this petition are important to all persons who are government employees in particular as well as to citizens who are concerned with the defamatory abuse of governmental power. These issues may be difficult, as the court below states (R. 51), for they concern the competing demands of justice for individuals and the security requirements of the nation; they involve con-

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[20] Plainly a justification in terms of what the Secretary of the Interior *might have done*, if he had been so lawfully minded, is, and can be, no justification in a United States court exercising the judicial power under the Constitution of the United States. As Mr. Justice Stone has said, "It is the Court's 'considered practice not to decide abstract, hypothetical or contingent questions.'" Alabama State Federation of Labor v. McAdary, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945). Respondents apparently agree, as they stated in their motion for stay of discovery, *supra*, pp. 9-10.

stitutional rather than statutory rights and procedures; and they have never been fully adjudicated by this Court.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

AMENDMENT 5

To The Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EXECUTIVE ORDER 10450

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and proceedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.); section 9 A of the Act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * * *

Section 8 (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

* * * *

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 27, 1953.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington

ORDER No. 2738 November 9, 1953
Subject: Security Regulations

GENERAL

Sec. 1 Purpose.
2 Definitions.

SECURITY REQUIREMENTS FOR EMPLOYMENT

3 Policy.
4 Standards.
5 Security Classification of Positions.
6 Security Investigations.
7 Re-employment of Employee Terminated as Security Risk.
8 Review of Full Field Investigations Conducted under Executive Order 9835.
9 Accessibility to Confidential Security Information.
10 Clearance for Non-sensitive Positions.
11 Clearance for Sensitive Positions.
12 Action of the Director of Security.
13 Termination of Temporary and Probationary or Trial Employees.
14 Criteria for Suspension or Reassignment.
15 Notification to Employee of Suspension or Reassignment.
16 Appeal Procedure.
17 Further Appeal Rights.
18 Pay and Restoration of Pay of Suspended Employees.
19 Establishment of Security Hearing Board.
20 Functions with Respect to Security Hearing Board.
21 Hearing Procedure.
22 Revocations.

GENERAL

Sec. 1 *Purpose.*

(a) If the duly constituted Government and the national Security of the United States are to be protected and made secure, it is imperative that all persons engaged in any capacity in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. This order is issued so that the Department of the Interior may have a program designed to insure that the personnel in its employment meet the minimum requirements considered necessary to protect and make secure the Government and the national security.

(b) The regulations in this order are designed to achieve two objectives: first, to make sure that all employees are unquestionably and trustworthy in their capacity as citizens engaged in government activities conducted under our constitutional form of government, second, to guard security information or material, the disclosure of which, would have an adverse effect on national security.

(c) This order prescribes for all bureaus and offices of the Department the procedures, standards and criteria for carrying out these objectives and are issued in accordance with the act of August 26, 1950 (5 U.S.C. 1946 ed., Supp. V, secs. 22-1, 22-2, 22-3), and Executive Order 10450 of April 27, 1953 (18 F. R. 2489), as amended.

* * * * *

Sec. 3. *Policy.*

(a) It shall be the policy of the Department, based on the act of August 26, 1950 (64 Stat. 476) and Executive Order No. 10450 of April 27, 1953, as amended, to em-

ploy and to retain in employment only those persons who are reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States in their capacity as citizens engaged in government activities conducted under the constitutional form of Government of the United States.

(b) No person shall be employed, or retained as an employee, in the department unless the employment of such person is clearly consistent with the interests of the national security.

• • • • •

Sec. 6. *Security Investigations.*

(c) *Temporary and Intermittent Employees.* Certain employees in non-sensitive positions whose term of employment is for 6 months or less are, subject to the approval of the Civil Service Commission, exempted from the investigations normally required for non-sensitive positions. Special instructions will be issued concerning such employees by the Director of Security.

• • • • •

Sec. 13. *Termination of Temporary and Probationary or Trial Employees.* The regulations in this order are not intended to take away any authority which the appointing officer may have to terminate, for cause, temporary and probationary or trial employees.

Sec. 15. *Notification to Employee of Suspension or Reassignment.*

(a) A written statement of charges shall be furnished the employee within 30 days after his suspension or temporary reassignment. The statement shall also inform the employee of his privileges under sec. 16 and if appropriate Sec. 17 of this order. This statement shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit, and shall be subject to amendment within 30 days of issuance.

(b) A copy of these regulations shall accompany the statement furnished the employee. The text of Executive Order 10450 and the act of August 26, 1950, are included in these regulations as Appendix C and D respectively.

Sec. 16. *Appeal Procedure.*

(a) An employee shall be afforded an opportunity to submit affidavits and statements and to answer such charges within 30 days after the receipt of the statement of such charges, or within 30 days after the receipt of an amendment thereof.

(b) Statements in refutation of the charges and supporting documents shall be considered by the Security Legal Officer and the Director of Security, who shall make a joint recommendation to the Secretary for the disposition of the case. If the Security Legal Officer and Director of Security are in disagreement, individual recommendations shall be made by them.

(c) Final decision as to termination of the employee will be made by the Secretary.

(d) A written statement of the decision of the Secretary shall be furnished the employee.

(e) Copies of notices of all personnel actions taken in the case shall be supplied by the bureau or office to the Civil Service Commission.

Sec. 17. *Further Appeal Rights. Permanent or Indefinite Employees.* An employee who is suspended or temporarily reassigned and who is a citizen of the United States and has a permanent or indefinite appointment and has completed his probationary or trial period shall, if he requests, be given a hearing before a security hearing board, constituted and conducting hearings as provided in this order. The decision of the hearing board will be reviewed and considered by the Secretary before a deter-

mination is made with respect to the termination of the employee.

• • • • •

Sec. 21. *Hearing Procedure.* The following hearing procedure shall be strictly adhered to:

(a) Hearings before security hearing boards shall be conducted in an orderly manner and shall be expedited as much as possible.

(b) Testimony before the hearing board shall be given under oath or affirmation.

(c) The hearing board shall take whatever action is necessary to insure the employee of a full and fair consideration of his case. The employee shall be informed by the board of his right:

(1) To participate in the hearings;

(2) To be represented by counsel of his choice;

(3) To present witness and offer other evidence in his behalf and in refutation of the charges brought against him; and

(4) To cross-examine any witness offered in support of the charges.

• • • • •

(e) Both the Department and the employee may introduce such evidence as the hearing board may deem proper in the particular case. Rules of evidence shall not be binding on the board, but reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered, so that the hearings shall not be unduly prolonged. If the employee is or may be handicapped by the non-disclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration. If a person who has made charges against the employee and who is not a confidential in-

formant is called as a witness but does not appear and refuses either to permit his deposition to be taken or to answer written interrogatories, his action in this regard shall be considered by the board in evaluating such charges.

• • • •

(i) Hearing boards shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

• • • •

(k) The board shall reach its conclusions and base its determinations on the transcript of the hearing, together with such confidential information as it may have in its possession. The conclusions and recommendations of the Board with respect to the employee against whom the charges have been made should specifically include a recommendation that the services of the employee be terminated or that termination is not warranted. The board, in making its determination, shall take into consideration the inability of the employee to meet charges of which he has not been advised because of security reasons, specifically or in detail, or to attack the credibility of witnesses who do not apear. The recommendations of the board shall be in writing and shall be signed by a majority of the members of the board. The recommendations of the board, and the complete record of the case, including investigative reports, shall be sent to the Secretary for use in his final review of the case.

• • • • •

Sec. 22. *Revocations.* This order supersedes all previous Departmental security regulations and Secretarial Orders Nos. 2308, as amended, 2459, 2460, 2488, 2489, 2490, as amended, 2491, 2538, and sections 6 and 7 of 2609, as amended.

/s/ DOUGLAS MCKAY
Secretary of the Interior

APPENDIX B-1

Guam News
GUAM SATURDAY, March 13, 1954
FIVE CENTS

answer the call
1954 RED CROSS CAMPAIGN
JOIN and SERVE!

Globe In Trust Isles

FIVE EMPLOYEES WILL BE OUSTED AS 'BAD RISKS'

Five Trust Territory personnel with several years service in the area are to be asked to resign as "security risks," Trust Territory High Commissioner Frank Midkiff confirmed yesterday.

Midkiff said the five are "scattered in various districts" of the Trust Territory and are the only ones of the 242 Americans employed in the territory to be under suspicion.

In almost every case, he said, the suspect will be permitted to resign, unless he chooses to fight. At least one has intimated he will demand a further hearing, Midkiff said.

Allegations are based on activities before coming to the territory, he continued and the suspects have been here "two or three years."

Midkiff stressed that the loyalty and patriotism of the five are not at issue.

"I doubt very much," he said firmly, "that any of them were mixed up with the Communist Party in the past."

Obviously disturbed by his distasteful chore of asking the resignations during his current tour of the islands and hesitant to discuss details of individual cases, he gave as an example of a security risk a known conscientious objector, saying that an advocate of pacifism is out of place in so sensitive and strategic an area as the trust territory.

There is no question of disloyalty," he repeated.

Saying that it was an extremely difficult subject for him to discuss, Midkiff concluded:

"There are many conscientious and able people who, not because of their disloyalty or lack of patriotism, are judged best located elsewhere than in some possibly very sensitive area."

Asked if this meant the five would be relocated within the department of interior, Midkiff said sadly that he doubted it, because of the recent reductions in force for budgetary reasons.

Daily News
GUAM
AGANA, GUAM SATURDAY, March
VOL. X NO. 62

Security Probe In

will demand a further hearing, Midkiff said.

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"I doubt very much," he said firmly, "that any of them were mixed up with the Communist Party in the past."

Obviously disturbed by his distasteful chore of asking the resignations during his current tour of the islands and hesitant to discuss details of individual cases, Midkiff attributed his mission to the federal government's security program.

"Security due to the pressure of Communism is of increasing concern to our government," he said, choosing his words carefully.

"The President has ordered a new look through all departments of the government, particularly in any sensitive areas and positions to make sure they are safe and that no undue chances are being taken

"There have not been very many new cases found — only a few, according to the President.

"The security section of each department in the government has restudied all cases, made their own decisions and reported to the secretaries of the departments, who have taken action.

"It is an attempt to be unusually cautious because of the new and mounting steps in international tension," he said.

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APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

PERSONAL

Registered Mail
Return Receipt Requested
Air Mail

Memorandum

To: Mr. William Vincent Vitarelli
Education and Training Specialist
Office of the High Commissioner
Trust Territory of the Pacific Islands
Honolulu, T. H.

From: The Secretary of the Interior

Subject: Suspension under Executive Order 10450 and Public Law 733, and Department Order 2738

1. By virtue of the authority vested in me by Executive Order 10450 dated April 27, 1953 (18 F. R. 2489) and the Act of August 26, 1950, (5 U.S.C., 1946 ed., Supp. V, Sec. 22-1 *et seq.*) as implemented by Departmental Order 2738, you are hereby notified that you are suspended from duty without pay and such suspension shall be effective at the close of business of the 2d day of April, 1954.

2. The reasons for your suspension and the charges against you, which are as specific as security interests permit, are as follows:

(a) That during the years 1941 to 1945, inclusive, but not limited thereto, you were either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party, including

but not limited to the following particulars as to such affiliation and sympathetic association, to-wit:

(1) During the years 1941 to 1945, inclusive, but not limited thereto, you were in sympathetic association with persons who were members of, affiliated with, or in sympathetic association with the Communist Party, including but not limited to the following named persons, to-wit: F———, also known as F———; W———, also known as W———; and W———, also known as W———.*

(2) In the year 1945 while you were a resident of New York City you registered a preference for the American Labor Party; the American Labor Party within New York City has been cited as being under the domination and control of the Communist Party or members thereof by a Special Committee on Un-American Activities of the House of Representatives of the United States, and by the State of California Committee on Un-American Activities.

(3) In your answer under oath of October 13, 1952, to the then Interior Department Loyalty Board you stated in effect that during the time you were teaching at Teachers College of Columbia University you subscribed to the USSR Information Bulletin and that you (and others interested) brought copies of the Daily Worker and of the New Masses.

The USSR Information Bulletin is the official publication of the Government of Soviet Russia and the Daily Worker and the New Masses are Communist publications which have been cited numerous times by the Special Committee on Un-American Activities of the House of Representatives of the United States.

It is noted that you also stated in connection with the above that bulletins from numerous other nations

* Full names deleted in printing.

and many other publications were taken or procured and that the purpose of all the publications was to have on hand information about various countries of all political orientations. The purpose of this paragraph is to present the facts in connection with all of said publications and allow an inquiry into the purpose of the same.

(4) In your said answer under oath of October 13, 1952, hereinabove mentioned, you stated with regard to your acquaintance and association with the said F——— and the said W———, hereinabove named, in brief as follows: Re F———; that you were not certain of his identity but believed he was the person you met in Georgia as F——— and that you would extend as much information as you could remember about F———. This information was to the effect that you were introduced to Mr. F———, may have had another personal contact with him, but were not sure, and had a faint recollection that you may have written him one letter, but that your association with him was rather casual and short lived, and that you never knew he was connected with any Communist front; Re W———; That you did know Mr. W——— and had several visits and associations with him solely as a professional matter, as detailed in your said answer, and no other associations with him, but you never knew he was a member of or a leader in the Communist Party.

As to these associations it is alleged: That in fact your associations with the said F——— were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W——— were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that

both the said F——— and the said W——— were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations.

(b) The Communist Party is a totalitarian and subversive organization which has adopted, maintained, and showed a policy of advocating or approving the commission of acts by force or violence to deny persons their rights under the Constitution of the United States and which has sought and now seeks to alter the form of the government of the United States by unconstitutional means. The Communist Party has been designated by the Attorney General of the United States as being within the purview of section 8(a)(5) of Executive Order 10450.

3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security.

4. You are hereby advised of your right and opportunity to submit any statements, answer, or affidavits to the Secretary of the Interior within 30 days after receipt of this notice to show why you should be reinstated or restored to duty. All such statements, answer, and affidavits should be sworn to under oath and it should be noted that any deliberate misrepresentations, falsifications, or omission of material facts may constitute sufficient basis for removal. You may also request a hearing before a board duly constituted for that purpose. I will review and consider such statements, answer, and affidavits, if any are submitted by you, and the recom-

mendation of the hearing board if a hearing is requested, and within 30 days thereafter you will be notified of my decision to either terminate your employment if I shall determine that such termination is necessary and advisable in the interests of the national security of the United States, or to reinstate you to your former employment. If you are reinstated you shall be allowed compensation for all of the period of your suspension, but the amount shall not exceed the difference between the amount you would normally have earned during the period of suspension at the rate you were receiving on the date of your suspension and your interim net earnings.

5. There is enclosed a copy of Departmental Order No. 2738 to which are attached copies of Executive Order 10450 and Public Law 733 (The Act of August 26, 1950).

/s/ DOUGLAS MCKAY
Secretary of the Interior

Enclosure

Cases—Continued

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APPENDIX C

Filed February 13, 1958. Joseph W. Stewart.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
January Term, 1958.

No. 13,708

C. A. 2870-56

WILLIAM VINCENT VITARELLI, Appellant,

v.

FRED A. SEATON, Secretary of the Interior of the United States, et al., Appellees.

APPEAL FROM the United States District Court for the District of Columbia.

Before: FAHY, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Feb. 13, 1958

Per Circuit Judge WASHINGTON.

Separate dissenting opinion by Circuit Judge FAHY.

Constitution and Statutes—Continued Page

Lloyd-LaFollette Act, Sec. 6, 37 Stat. 555, as amended, 5 U.S.C. 652 11

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 13,702

WILLIAM VINCENT VITARELLI, APPELLANT,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL., APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Decided February 13, 1958

Mr. Clifford J. Hynning for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Assistant Attorney General Doub,* and *Mr. Paul A. Sweeney, Attorney,* Department of Justice, were on the brief, for appellees.

Before FAHY, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a suit by a former Government employee, seeking reinstatement and declaratory relief.

Plaintiff-appellant occupied a position in the Department of the Interior, designated "Education and Training Specialist," which was excepted from the classified civil service. In early 1954, after some three years of employment, he was suspended by the Secretary of the Interior on charges (among other things) (1) that he was a member of, affiliated with, or in sympathetic association with, the Communist Party, (2) that his behavior, activities and

associations tended to show that he was not reliable or trustworthy, and (3) that he had "deliberately misrepresented, falsified or omitted material facts" in answering, under oath, questions addressed to him in 1952 by the Interior Department Loyalty Board. The charges were purportedly made pursuant to the Act of August 26, 1950, 5 U.S.C. § 22-1 (1952), and Executive Order No. 10,450, 18 FED. REG. 2489 (1953). Plaintiff-appellant filed an answer, together with some forty-four affidavits. He was given a hearing before a Security Hearing Board. Appellant was present in person, and had the services of counsel. He was not confronted with any witnesses. Certain confidential information was not disclosed to him. At the hearing, the Government attorney stated that appellant was not charged with disloyalty, and that the "question is only whether he is a security risk." Some weeks after the hearing, the Secretary of the Interior made findings sustaining the charges, and dismissed appellant. A rehearing was granted, and additional testimony taken. Reinstatement, however, was refused. Suit was then commenced in the District Court. The Government, as explained in the concluding paragraph of this opinion, thereafter issued a new notice of termination of appellant's employment, and expunged its records of adverse findings. Summary judgment was requested by the Government, and granted. This appeal followed.

Appellant's principal contention is that he must be reinstated because—as the Government admits—the position he occupied was not a sensitive one, and accordingly the Act of 1950 and Executive Order No. 10,450 could have no application to him, under the doctrine of *Cole* v. *Young*, 351 U.S. 536 (1956). The question is, then, whether *Cole* requires his reinstatement.

The decision of the Supreme Court in *Cole* was based on the traditional responsibility of the courts to insure that Government employees sought to be dismissed are given the benefit of all procedural protections required

by statute or regulation.[1] The Court laid down no general prohibition of dismissals on security or loyalty grounds. On the contrary, the Court said:

> "In interpreting the 1950 Act, it is important to note that the Act is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-La-Follette and Veterans' Preference Acts—authorize dismissals for 'such cause as will promote the efficiency of the service,' and the ground which we conclude was the basis for petitioner's discharge here—a reasonable doubt as to his loyalty—was recognized as a 'cause for dismissal under those procedures as early as 1942. . . . Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." (pp. 543-44) (Emphasis in original.)

The inquiry in *Cole* was, therefore, a procedural one. The plaintiff in that case was a veteran. Notwithstanding that fact he was denied the protections and procedures of the Veterans Preference Act. The Supreme Court held that he should have been given the benefits of that Act and remanded the case to the District Court for appropriate proceedings. Similarly, in *Service* v.

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[1] See also Service v. Dulles, 354 U.S. 363 (1957) (non-compliance with regulation); Peters v. Hobby, 349 U.S. 331 (1955) (non-compliance with Executive Order No. 9,835). For examples in this court see Kerr v. Barnes, 100 U.S.App. D.C. 51, 242 F.2d 24 (1956); Kutcher v. Higley, 98 U.S.App. D.C. 278, 235 F.2d 505 (1956); Haynes v. Thomas, 98 U.S. App.D.C. 131, 232 F.2d 688 (1956); Burrell v. Martin, 98 U.S.App.D.C. 33, 232 F.2d 33 (1955); Flanagan v. Young, 97 U.S. App.D.C. 119, 228 F.2d 466 (1955); Mulligan v. Andrews, 93 U.S.App.D.C. 375, 211 F.2d 28 (1954); Money v. Anderson, 93 U.S.App.D.C. 130, 208 F.2d 34 (1953). See also Powell v. Brannan, 91 U.S.App.D.C. 16, 196 F.2d 871 (1952), and cases cited.

Dulles, 354 U.S. 363 (1957), the dismissed employee was an officer in the Foreign Service of the United States "and as such was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U.S.C. § 801, *et seq.*" 354 U.S. 371 at n. 12. As the Supreme Court pointed out, the procedures required by that Act were not afforded to him. When the Supreme Court held that the action which the Government had taken in an effort to dismiss Service was invalid, it thus became clear (as was true in *Cole*) that if the Government wished to press its charges once more it must do so under the required statutory procedure. In the case at bar the petitioner had no prescribed tenure of office and is not a veteran, nor a member of the Foreign Service, nor in any other specially-protected group. He is not a member of the classified civil service and accordingly is not entitled to such protection as the Lloyd-LaFollette Act gives. 37 STAT. 555 (1912), 5 U.S.C. § 652 (1932). Nor, of course, is he entitled to the procedural protections provided by the Act of August 26, 1950, which has no application to him.[2]

Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds. *Wieman* v. *Updegraff*, 344 U.S. 183, 191, 192 (1952); *McGinty* v. *Brownell*, — U.S.App.D.C. —, 249 F.2d 124 (1957). But no such

[2] Where the Executive extended—by Executive Order No. 10,450—the provisions of the 1950 Act to employees in sensitive positions who might not, under that Act standing alone, be entitled to the procedural protections outlined in the Executive Order, this court held the Government to observance of those protections. Haynes v. Thomas, *supra* note 1 (probationary employee in Navy Department held entitled to protections of Executive Order No. 10,450). But where, as here, the employee is not in a position declared sensitive, the 1950 Act and the Executive Order are inapplicable to him, under the rule in *Cole*. The decision in Service v. Dulles, *supra* note 1, relied on by appellant, is not pertinent unless statues or regulations "were indeed applicable and were violated." 354 U.S. at 373.

dismissal occurred here. Dismissal on loyalty or security grounds certainly is not unconstitutional *per se*; the Supreme Court's language in *Cole* refutes any contention of that sort.[3] And the treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing. This was more than he was entitled to under any statute or regulation applicable to persons of his employment status.

It is true, as appellant urges, that an administrative order "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).[4] But, as the Supreme Court made clear in the second *Chenery* case, the courts will disturb the agency's conclusion "only if it lacks *any* rational and statutory foundation." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). (Emphasis supplied.) In this case there was clearly a "rational" foundation for the Secretary's dismissal of appellant. There was also a sufficient "statutory" foundation—the constitutional power of the Executive to dismiss subordi-

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[3] This court has said: "It is our clear opinion that the President, *absent congressional restriction*, may remove from Government service any person of whose loyalty he is not completely convinced." Bailey v. Richardson, 86 U.S. App.D.C. 248, 267, 182 F.2d 46, 65, *affirmed by an equally-divided court*, 341 U.S. 918 (1951). (Emphasis added.)

In *Cole* and *Service* the Supreme Court held that there were "congressional restrictions" on dismissal which the Government had failed to observe. In the instant case there were no such restrictions.

[4] We reecntly applied that rule where the Secretary of State relied exclusively on a particular regulation in denying a passport to an applicant, but failed to make the findings which that regulation required. Boudin v. Dulles, 98 U.S. App.D.C. 305, 235 F.2d 532 (1956).

nates: a power not limited in the present instance by statute or regulation.[5]

For these reasons, we find that appellant was legally discharged, even though the proceedings were improperly labelled as being brought under the authority of the Act of 1950 and Executive Order No. 10,450. He was not deprived—in contrast to the situation in *Cole* and *Service*—of any procedural right or protection to which he was entitled. It may be noted, too, that one of the grounds of dismissal furnishes a clear basis for the Secretary's action, quite apart from the questions raised by the appellant. Charge 3 against appellant reads as follows:

> "3. Your behavior, activities and associations tend to show that *you are not reliable or trustworthy*, and the facts above alleged furnish reason to believe that *you have deliberately misrepresented, falsified or omitted material facts* in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security." (Emphasis added.)

The charge of untrustworthiness and deliberate misrepresentation was found by the Secretary of the Interior to have been sustained on the evidence before him.

There is no basis on which we can weigh the evidence, or conclude that the Secretary's action in dismissing appellant could not properly be rested on that ground. The power of the Executive to discharge for untrustworthiness or deliberate misrepresentation is beyond dispute, even under the here inapplicable Lloyd-LaFollette and Veterans' Preference Acts. See *Williams* v. *Cravens*, 93 U.S.App.D.C. 380, 381, 210 F.2d 874, 875, cert. denied sub nom. *Williams* v. *Robbins*, 348 U.S. 819 (1954); *Kohlberg* v. *Gray*, 93 U.S.App.D.C. 97, 207 F.2d 35 (1953), cert.

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[5] See footnotes 2 and 3, *supra*.

denied, 346 U.S. 937 (1954). And, so long as one [6] of the grounds announced appears rational and proper, courts have refused to review the evidence or to examine the merits of the executive officer's finding.[7] It is not our function to decide whether appellant was or was not untrustworthy, or a "security risk."

An additional point remains. Appellant asserts that the Secretary's action illegally fastened upon him a "badge of infamy," which can be removed only by his reinstatement. We think, however, that the Secretary's mistaken reliance on the Act of 1950 and Executive Order No. 10,450 does not require the relief appellant asks. The record shows that appellant's notice of termination, as originally issued, stated that action was "being taken in accordance with the provisions of Executive Order 10450." But, two years later, after suit had been brought in the District Court, a new notice was issued which omitted the quoted statement. An affidavit was also filed by an official of the Civil Service Commission stating that "all records of the said Commission have been expunged of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450." We think that this voluntary action by the Government is equivalent to the maximum relief a court might have been justified in granting under all the circumstances of the case. See *Peters* v. *Hobby*, 349 U.S. 331, 349 (1955);

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[6] See Deviny v. Campbell, 90 U.S.App.D.C. 171 at 174, 194 F.2d 876 at 879, *cert. denied*, 344 U.S. 826 (1952). *Cf.* Kuhn v. Civil Aeronautics Board, 87 U.S.App.D.C. 130, 183 F.2d 839 (1950). The circumstance that the third ground of dismissal was intimately related to the first two grounds would seem immaterial here.

[7] Keim v. United States, 177 U.S. 290 (1900); Eberlein v. United States, 257 U.S. 82 (1921); Levine v. Farley, 70 App.D.C. 381, 107 F.2d 186 (1939), *cert. denied*, 308 U.S. 622 (1940); Carter v. Forrestal, 85 U.S.App.D.C. 53, 175 F.2d 364, *cert. denied*, 338 U.S. 832 (1949).

Service v. *Dulles*, 98 U.S.App.D.C. 268, 272, 235 F.2d 215, 219 (1956), rev'd on other grounds, 354 U.S. 363 (1957).

Affirmed.

FAHY, *Circuit Judge, dissenting:* The original termination action of the Secretary, effective September 10, 1954, was explicitly rested by him upon Executive Order 10450,[1] which in turn rested upon the Act of August 26, 1950.[2] This appears upon the face of the Secretary's "Findings and Final Determination" and from the "Notification of Personnel Action."

I cannot read Charge 3, referred to by the majority, or any finding of the Secretary based thereon, as in any sense independent of executive Order 10450 or the Act of August 26, 1950.

It is conceded that under the decision of the Supreme Court in *Cole* v. *Young*, 351 U.S. 536, said Executive Order and Act did not authorize the Secretary's action in this case. Accordingly, the basis for the original termination disapears, and with it the validity of that termination.

On October 12, 1956, a second "Notification of Personnel Action" was delivered to appellant. This in terms purported to terminate the employment as of the date of the original termination, September 10, 1954, and was not based upon Executive Order 10450 or the Act of August 26, 1950. But this action of course could not relate back as attempted, and at most could be effective only as of the time it was taken, October 12, 1956.

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[1] 18 Fed. Reg. 2489 (1953).

[2] 64 Stat. 476, 5 U.S.C. § 22-1 (1952).

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In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM VINCENT VITARELLI, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, HARRIS ELLSWORTH, CHAIRMAN OF THE CIVIL SERVICE COMMISSION OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW

The order of the United States District Court for the District of Columbia (R. 37–38) is not reported. The opinions of the Court of Appeals for the District of Columbia Circuit (R. 38–45) are reported at 253 F. 2d 338.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958 (R. 46). On May 5, 1958, by order of the Chief Justice, the time to file a petition for a writ of certiorari was extended until June 13,

1958 (R. 47). The petition for a writ of certiorari was filed on June 12, 1958, and granted on October 27, 1958 (R. 48). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner's removal from a non-sensitive position in the Department of Interior, on September 10, 1954, was erroneously based upon the Act of August 26, 1950, and Executive Order 10450. Subsequent to his removal, and following this Court's decision in *Cole* v. *Young,* 351 U.S. 536, the Civil Service Commission expunged from its records all adverse findings under Executive Order 10450 and the Department of Interior issued a new "Notification of Personnel Action" which reflects that petitioner's employment was terminated on September 10, 1954, but contains no reference to Executive Order 10450. Petitioner was admittedly not entitled to the benefits of the Lloyd-LaFollette Act or the Veterans' Preference Act of 1944.

The question presented is whether, in the light of these circumstances, petitioner is now entitled to a judicial determination that he was wrongfully discharged from his employment and to a judicial direction that he be reinstated in his former position.

STATUTE, EXECUTIVE ORDER AND REGULATION INVOLVED

The Act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22–1, 22–3), Executive Order 10450, issued April 27, 1953 (18 Fed. Reg. 2489), and Department of the Interior Order No. 2738, dated November 9, 1953, are

set forth, in pertinent part, in the Appendix, *infra*, pp. 27–45.

STATEMENT

On September 10, 1952, petitioner, a non-veteran, was appointed by the Department of Interior, Office of Territories, as an Education and Training Specialist on the Pacific Island of Koror (R. 25–26). Since this position was within Schedule A of the Civil Service regulations (5 C.F.R. 6.101(h)) and therefore excepted from the classified civil service, petitioner's appointment did not confer upon him civil service status (R. 25–26). Rather, petitioner signed an agreement to serve in his employment for twenty-four months, "or such part thereof as [his] services may be needed" (R. 27–29).

On April 2, 1954, petitioner was suspended from his employment and served with written charges by the Secretary of the Interior pursuant to the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. 22–1 (*infra*, pp. 27–29),[1] and Executive Order No. 10450 (18 Fed. Reg. 2489) (*infra*, pp. 30–40), as implemented by the Department of the Interior Order No. 2738 (R. 3–6) (*infra*, pp. 40–45). The charges, in substance, were that petitioner during the years 1941 to 1945 was either a member of, affiliated with, or in sympathetic association with, the Communist Party and members of the Communist Party (R. 3–5); that petitioner's "behavior, activities and associations tend to show

[1] The Act of August 26, 1950, was made applicable to the Department of Interior by Executive Order No. 10450 (see *infra*, p. 30).

that [he is] not reliable or trustworthy," that there was reason to believe that petitioner had "deliberately misrepresented, falsified or omitted material facts in connection with [his] behavior, activities and associations", and that there was reason to believe that petitioner "may be subjected to coercion, influence, or pressure which may cause [him] to act contrary to the best interests of national security" (R. 5–6). Petitioner was advised of his right to submit any statements, answers, or affidavits to the Secretary of Interior to show why he should be reinstated or restored to duty. He was also advised that he could request a hearing before a board constituted for that purpose and that the Secretary of Interior would review and consider his statements, answer and affidavits and the recommendation of the hearing board if a hearing were requested, whereupon he would be notified of the Secretary's decision either to terminate his employment as "necessary and advisable in the interests of the national security of the United States," or to reinstate him in his former employment (R. 6).

Petitioner subsequently filed with the Secretary of Interior a written answer, together with 44 affidavits concerning his loyalty and character. On June 11, 1954, petitioner was advised that his answer and supporting affidavits did not constitute sufficient grounds to reinstate him (R. 10, 20, 30).

On June 22 and July 1, 1954, petitioner, together with counsel, appeared before a hearing board consisting of three disinterested employees of agencies other than the Department of Interior (R. 10, 20,

30). Based upon the entire record in petitioner's case, the hearing board on August 26, 1954, recommended "that the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security" (R. 30).

On September 2, 1954, the Secretary of Interior found it "advisable and necessary that the employment of [petitioner] should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954" (R. 30). The Secretary, therefore, determined and ordered "that the employment of [petitioner] * * * be, and the same is hereby, terminated in the interest of the national security at the close of business on September 10, 1954." On October 25, 1955, petitioner applied for reinstatement or rehearing. This application resulted in the taking of certain testimony on November 14, 1955. The application was however denied by the Secretary on May 11, 1956.

On June 11, 1956, this Court rendered its decision in *Cole* v. *Young*, 351 U.S. 536, holding that the Act of August 26, 1950, and Executive Order 10450 were inapplicable to a non-sensitive position such as had been held by petitioner. On June 12, 1956, petitioner made written demand upon the Secretary "to restore him to duty forthwith in accord with the decision of the Supreme Court in *Cole* v. *Young* * * *" (R. 12). The Secretary did not comply with this demand (R. 12).

On July 10, 1956, petitioner instituted this action against the Secretary of the Interior and the Civil

Service Commissioners, seeking (1) a declaratory judgment that his discharge was illegal; and (2) a mandatory injunction directing reinstatement, back-pay and the expunging of all records pertaining to petitioner's discharge (R. 7–18). Following the commencement of this action, the Civil Service Commission expunged from its records "all adverse findings made with respect to [petitioner] under Executive Order 10450" (R. 34). The Department of Interior, in place of an official termination notice dated September 21, 1954 reflecting that the petitioner's termination was "taken in accordance with the provisions of Executive Order 10450" (R. 32), substituted a new notice of termination dated September 21, 1954, which contained no reference to Executive Order 10450, but which states that it "is a revision of and replaces the original bearing the same date" (R. 33–34).

On cross-motions for summary judgment, the District Court dismissed the complaint (R. 37). In its order, the court noted that respondents concede that the removal of petitioner as a "security risk" was not authorized by the Act of August 26, 1950; and that respondents had "taken all practical steps, short of reinstating plaintiff or giving him back pay, to remove the stigma, if any, which may have resulted from his removal by expunging from [his] records * * * all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450" (R. 37). Further, the court's order recites that the position to which petitioner seeks reinstatement "was and is a 'Schedule A' position, which is excepted

from the competitive civil service and from which plaintiff could be summarily removed with or without cause under the general authority of the executive branch to appoint and remove employees excepted from the competitive civil service; and that this Court cannot order the reinstatement of plaintiff, whose tenure, as a 'Schedule A' employee, is only at the will of the employing Government; * * *'" (R. 37).

The Court of Appeals affirmed, Fahy, J., dissenting (R. 38–45). It held that the security risk discharge procedures provided by the Act of 1950, Executive Order No. 10450, and Departmental Order 2738, were prescribed for the discharge of employees in sensitive positions who normally would be entitled to even greater procedural protection under other statutes such as the Lloyd-LaFollette or Veterans' Preference Acts (R. 40–41). However, since petitioner was not a veteran nor otherwise protected in the tenure of his employment, he was subject to summary dismissal and therefore not entitled to the benefit of the Act of 1950 and the Executive Order implementing it (R. 41). At most, he was entitled not to be discharged for "flagrantly arbitrary" or unconstitutional grounds, and dismissal as a security risk was neither "flagrantly arbitrary" nor unconstitutional *per se* (R. 41). Moreover, the procedure utilized by the Secretary, including formal written charges, an opportunity for petitioner to answer, and a hearing at which he was represented by counsel and presented witnesses, afforded petitioner due process (R. 41–42). Therefore, although the Secretary erred in citing the

Act of 1950 and the implementing Executive Order as the authority for the discharge proceedings, the discharge was nevertheless valid (R. 42–43). One of the grounds for dismissal—that petitioner was "not reliable or trustworthy" and had "deliberately misrepresented * * * material facts"—furnished an adequate basis for dismissal regardless of the questions raised concerning the security discharge procedures (R. 43–44). The court also noted that respondents had already afforded petitioner the full relief to which he would be entitled even if the 1954 discharge were invalid (R. 44). In this connection, it pointed out that the Civil Service Commission had voluntarily expunged its records of findings that petitioner was a security risk, and that the Department of the Interior had substituted a second termination notice which omitted all reference to discharge for security reasons (R. 44).

SUMMARY OF ARGUMENT

Petitioner complains of his removal from a position in government employment which he occupied only at the will of the appointing authority and without statutory protection as to tenure or as to procedures for dismissal. No pertinent regulation of the Department of Interior was violated by petitioner's removal, and the record as it now stands is free of any indication that petitioner was removed as a security risk. In these circumstances, no judicial relief can properly be accorded petitioner on account of his removal from his post and the courts below were correct in so holding.

I

A. The role of the courts in reviewing dismissals of employees in the executive branch is a limited one, confined to a determination of whether there has been compliance with procedural requirements of statutes or regulations, or whether the removing authority has exceeded the bounds of its authority, or whether there has been an invalid discrimination prohibited by the Constitution. Petitioner, because of his unprotected status in government employment, has no basis for judicial complaint; he was at all times subject to dismissal for cause or for no cause, without notice or hearing, and without need for assignment of reasons. Apart from the Act of August 26, 1950, no statute is claimed to have limited the Departmental power of removal, and there was clearly no discrimination forbidden by the Constitution.

B. 1. The Act of August 26, 1950 (involved in *Cole v. Young*, 351 U.S. 536), and the Department of Interior security regulations, did not confer upon petitioner any procedural or substantive rights against removal. The purpose of the Act and the regulations was to facilitate the removal by summary procedures of employees of the Government who were subject to such legislation as the Lloyd-LaFollette Act or the Veterans' Preference Act. Petitioner did not come within that class; he was protected by no legislation.

2. But even if the procedures prescribed by the Act of 1950 were applicable to petitioner, they were complied with. He was given a written statement of the charges against him; he submitted an answer, with supporting affidavits, to the charges; he was given

a hearing and, after deliberative consideration by the Secretary of Interior, was given written notification of the reason for his dismissal. He was, therefore, given the benefit of the statutory and regulatory procedures prescribed for removing employees in sensitive positions who were protected by the Lloyd-LaFollette or Veterans' Preference Acts. This was more than his due, and he cannot complain that these procedures were inadequate.

3. Because petitioner was not entitled to any procedural protection and was given procedural benefits to which he was not legally entitled, this case does not present any serious question of procedural due process. Even if there be some residue of procedural due process for employees without statutory or regulatory protection in their employment, that measure was accorded petitioner by reason of the written notification of charges, the opportunity to answer, and the hearing which preceded his termination.

C. Concededly, because of the non-sensitive character of his position with the Department of Interior, petitioner's removal was not authorized by the Act of August 26, 1950. It does not follow, however, that his discharge was invalid. As we have pointed out, no statute or regulation was violated. Wholly apart from the 1950 Act, the Secretary of Interior had unfettered authority to remove petitioner from his employment. That removal, sustainable under the Secretary's plenary power, is not rendered invalid because the Secretary erroneously relied upon the supposed authority of the 1950 Act, particularly since reference to the

1950 Act and Executive Order 10450 have now been expunged from the records.

II

Respondents have expunged from their records adverse findings and references with respect to petitioner's removal. Petitioner has therefore obtained all the relief which a court might have been justified in granting in his case. *E.g., Peters* v. *Hobby,* 349 U.S. 331, 349. Since none of his procedural or substantive rights were violated by the removal itself, there is no basis for invalidating that removal, and consequently petitioner has no right to reinstatement. And even if his 1954 discharge were held to be invalid, his employment was effectively and validly terminated in 1956 by reason of the "Notification of Personnel Action" issued by the Department of Interior, giving no reason for petitioner's termination and withdrawing the prior notification. For this additional reason, there is no present right to reinstatement.

ARGUMENT

Petitioner concedes that, since he occupied a Schedule A position excepted from the classified civil service, the procedural benefits of the Lloyd-LaFollette Act[2] are not applicable to him (Pet. Br. 14, 16, 32). Similarly, it is admitted that he is not a veteran and therefore is not entitled to the procedural benefits of the Veterans' Preference Act of 1944.[3] And since the position from which he was removed had not been designated

[2] Section 6, 37 Stat. 555, as amended, 5 U.S.C. 652.

[3] Section 14, 58 Stat. 390, as amended, 5 U.S.C. 863.

as sensitive, the procedure prescribed by the Act of August 26, 1950,* and Department of Interior Order No. 2738 had no valid application to him. *Cole* v. *Young*, 351 U.S. 536. Thus, petitioner complains of his removal from a position in government employment which he occupied only at the will of the appointing authority, and without statutory protection either as to tenure or as to procedures for dismissal. Moreover, no pertinent regulation of the Department of the Interior was violated by petitioner's removal, and the record as it now stands is free of any indication that he was regarded as a security risk.

In these circumstances, we submit that no judicial relief can properly be accorded petitioner on account of his removal from his post, and that the courts below were correct in so holding.

I

PETITIONER'S REMOVAL FROM FEDERAL EMPLOYMENT WAS VALID BECAUSE NOT IN VIOLATION OF ANY STATUTE, EXECUTIVE ORDER, OR REGULATION

A. *In the absence of a violation of procedural rights or of clear discrimination, a court may not invalidate the dismissal of a Government employee.*

Measured by the traditional standards of judicial review in personnel removal cases, the role of the courts in reviewing dismissals of employees in the executive branch is a limited one, confined to a determination of whether there has been compliance with procedural requirements of statutes or regulation, or

* 64 Stat. 476, 5 U.S.C. 22–1.

whether the removing authority has exceeded the bounds of its authority, or whether there has been an invalid discrimination. *E.g.*, *Eberlein* v. *United States*, 257 U.S. 82; *Burnap* v. *United States*, 252 U.S. 512; *Reagan* v. *United States*, 182 U.S. 419; *Keim* v. *United States*, 177 U.S. 290; *Green* v. *Baughman*, 243 F. 2d 610, 613 (C.A.D.C.); *Hargett* v. *Summerfield*, 243 F. 2d 29, 32 (C.A.D.C.); *Saggau* v. *Young*, 240 F. 2d 865 (C.A.D.C.); *Ellmore* v. *Brucker*, 236 F. 2d 734, 736–7 (C.A.D.C.); *Smith* v. *Dulles*, 236 F. 2d 739, 742 (C.A.D.C.); *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A.D.C.); *Kegton* v. *Anderson*, 229 F. 2d 519 (C.A. D.C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C.A.D.C.); *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A.D.C.); *Blackmon* v. *Lee*, 205 F. 2d 13 (C.A.D.C.); *Terry* v. *Stevens*, 203 F. 2d 219 (C.A.D.C.). See also the Government's brief in *Greene* v. *McElroy*, No. 180, this Term, at pp. 36–40, 41–43.

This limited inquiry of the courts is, of course, founded upon the basic constitutional proposition that the powers of appointment and removal of executive employees are vested in the executive and legislative branches of the Government. Article II, Secs. 2, 3 of the Constitution; *Myers* v. *United States*, 272 U.S. 52; *Wiener* v. *United States*, 357 U.S. 349. And where, as in this case, the appointive and removal authority are subject exclusively to the discretion of the executive unfettered by statutory or self-imposed limitations, the courts "can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal"—at least in the absence of

a plainly unconstitutional discrimination. *Matter of Hennen,* 13 Pet. 230, 261.

The recent decisions of this Court in employee removal cases accord with this limited function of the judiciary in matters of federal personnel administration. In *Peters* v. *Hobby,* 349 U.S. 331, the Court's inquiry was whether the action of the Loyalty Review Board of the Civil Service Commission was in violation of the Executive Order from which the Board's authority was derived; in *Cole* v. *Young,* 351 U.S. 536, the issue was whether the Act of August 26, 1950 and Executive Order 10450 authorized the removal of an employee in a non-sensitive position subject to the Veterans Preference Act; in *Service* v. *Dulles,* 354 U.S. 363, the inquiry was whether the Secretary of State had complied with State Department regulations applicable to the removal of security risks. And, as pointed out in the Government's brief in No. 180, *Greene* v. *McElroy,* at pp. 36–39, the *Public Workers—Wieman—Slochower* line of cases[5] concern unconstitutional substantive discrimination, rather than procedural rights.

Unless, therefore, petitioner could point to some statute, executive order, or regulation which restricted the plenary authority of the Secretary of the Interior to remove him—or unless he could prove that his removal was unconstitutionally discriminatory—this suit would necessarily have to fail. Admittedly, no legislation protected petitioner or afforded him rights as a

[5] *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100; *Wieman* v. *Updegraff,* 344 U.S. 183; *Slochower* v. *Board of Education,* 350 U.S. 551.

federal employee; and he plainly has no basis for claiming that the Interior Department discriminated against him on any substantive ground forbidden by the Constitution. In the next section of this brief, we shall show that he cannot rely on any regulation or executive order. In short, he was at all times subject to dismissal for cause or for no cause, without notice or hearing, and without need for assignment of reasons.

B. *Petitioner has no valid basis for complaining of the procedures which were employed to dismiss him*

1. Relying upon *Service* v. *Dulles,* 354 U.S. 363, petitioner argues that, since the Interior Department promulgated security regulations (App. *infra,* pp. 40–45) pursuant to Executive Order 10450, petitioner could be removed from his employment only pursuant to those regulations (Pet. Br. 24–25). The argument is without merit. In *Service* v. *Dulles,* the Secretary of State, by reason of State Department regulations, bound himself to comply with those regulations even where his removal authority was exercised in reliance on the so-called McCarran rider which gave him full power of removal. This case, however, is significantly different in that Interior's regulations were confined in their application to security removals under the authority of Executive Order 10450 and the Act of 1950, and did not (and were not intended to) delimit the otherwise plenary authority of the Secretary to dismiss an employee, such as petitioner, whose employment was subject to neither the Lloyd-LaFollette Act or the Veterans' Preference Act.

The purpose of the 1950 Act, the Executive Order, and Interior's own security regulations was not to expand the procedural rights of employees without any tenure, such as petitioner; on the contrary, it was the plain purpose of the 1950 Act to narrow the procedural rights of protected employees in order to facilitate their removal, by summary procedures, in the interest of national security. This view of the 1950 Act is clear from its history[6] and from its text which provides (5 U.S.C. 22–1, App., *infra*, p. 27) that "notwithstanding the provisions of [the Lloyd-LaFollette Act] or the provisions of any other law" the named department heads may "in the interest of national security" effect the removal of any employee. Removals under the 1950 Act were subject to the "absolute discretion" of the removing authority, subject to such procedural limitations as the "agency head determines that the interests of national security permit" (*ibid*).

In these circumstances, it is wholly fallacious to argue, as does petitioner, that the Act of 1950 or the implementing regulations of the Department of Interior conferred, or were intended to confer, special procedural rights upon employees not protected by the Lloyd-LaFollette Act, the Veterans' Preference Act, or any other law. Particularly with respect to those employees not governed by the 1950 Act—as has

[6] "The purpose of the bill is to *increase* the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action." (Emphasis added.) S. Rept. No. 2158, 81st Cong., 2d Sess., p. 2.

now been authoritatively held for one in petitioner's non-sensitive position—would it be anomalous to hold that the Department nevertheless bound itself to accord them more procedural rights than the rights to which they would otherwise be entitled.

2. But even if the procedures prescribed by the Act of August 26, 1950, and by Department of Interior Order No. 2738 (App. *infra*, pp. 27–29, 40–45), were applicable to him, petitioner would have no justifiable basis for complaint. In compliance with the Act and Section 15(a) of Interior's regulations, petitioner was given "a written statement of charges" (App. *infra*, p. 42) and advised of his privilege to "submit affidavits and statements and to answer such charges" (App. *infra*, pp. 42–43). In accord with the Act and with the regulations (App. *infra*, pp. 27–28, 42–43), he was advised of his right to, and (at his request) was given, a hearing before a duly constituted board convened for that purpose by the Secretary of the Interior. Following the hearing at which petitioner was present, was represented by counsel, and presented witnesses on his behalf, the Board determined and recommended to the Secretary that petitioner's employment "is not clearly consistent with the interests of national security" (R. 30). Again, in compliance with the Act and the Departmental regulations (App. *infra*, pp. 28, 45), the Secretary and others within the Department reviewed peti-

[7] The regulatory procedures prescribed by Department of Interior Order No. 2738 do not differ in any material respect from the procedures prescribed by the statute. See App. *infra*, pp. 27–30, 40–45.

tioner's case and determined that his employment should be terminated "in the interest of the national security" (R. 30) "for the reasons specifically set forth in the letter of charges dated March 30, 1954" (R. 30). As prescribed by the Act and the regulations (App. *infra*, pp. 28, 43), petitioner was thereupon given a "written statement of the decision of the [Secretary of Interior]; (R. 29–31). In the light of this record, it is clear that petitioner was given the benefit of the statutory and regulatory procedures prescribed for persons in sensitive positions who were protected by other federal personnel legislation. This was more than his due, and he cannot complain that these procedures were inadequate.

3. Since petitioner was not legally entitled to any procedural protections and was, in fact, given procedural benefits to which he was not legally entitled, this case does not present any serious question of procedural due process. We do not concede that federal employees left unprotected by statute and regulation are entitled by the Constitution to any procedural protections against summary removal. See the discussion in the Government's brief in *Greene* v. *McElroy*, No. 180, at pp. 39–40, 41–43, and *supra*, pp. 12–14. But even if there be some residue of procedural due process for such employees-at-will, that measure was accorded here. The charges against petitioner (R. 3–5) were, on their face, specific enough to inform him of the nature of the information which prompted his suspension and finally his dismissal. Cf. *National Labor Relations Board* v. *Mackay*, 304 U.S. 333; *Moog Industries* v. *Federal*

Trade Comm'n, 238 F. 2d 43 (C.A. 8); *Bailey* v. *Richardson*, 182 F. 2d 46, 58 (C.A.D.C.), affirmed by an equally divided Court, 341 U.S. 918. Moreover, the record in this case, since it does not include petitioner's answer to the charges or the 44 affidavits he submitted in response to the charges (R. 10, 20), affords no basis for inferring that petitioner, in his written refutation of the charges, was so prejudiced for want of sufficient information or for lack of disclosure of the Government's sources of its derogatory information as to be wholly at sea. And the generalities which assertedly inhere in Paragraph 3 (R. 5–6) of the charges (Pet. Br. 25–27) cease to be so general when read in conjunction with the specific allegations of fact (R. 3–5) to which Paragraph 3 refers and upon which the charges in Paragraph 3 were based. As the Court of Appeals held (R. 42):

> * * * And the treatment accorded appellant [petitioner] was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing. This was more than he was entitled to under any statute or regulation applicable to persons of his employment status.

C. *The erroneous belief by the Secretary of Interior that the Act of 1950 and Executive Order 10450 governed petitioner's removal does not invalidate his dismissal*

It is and has been conceded that, because of the nonsensitive character of his position with the Department of Interior, petitioner's removal on security grounds was not authorized by the Act of August 26,

1950, or Executive Order 10450 (App. *infra*, pp. 27–40). It does not follow, however, that because the Secretary erroneously relied upon these supposed authorities petitioner's discharge was invalid—if, as we have shown, it was otherwise lawful. In *Cole* v. *Young*, 351 U.S. 536, the discharge was unauthorized by the 1950 Act, but the Court's decision that the discharge was invalid was based upon the fact that the discharge was accomplished in violation of Section 14 of the Veterans' Preference Act to which that employee was subject. 351 U.S. at 543, 557–558. As we have stressed, petitioner's discharge entailed no such violation.

Similarly, in *Service* v. *Dulles*, 354 U.S. 363, the invalidity of the employee's removal was predicated upon the Secretary of State's violation of State Department regulations, and the failure of the Secretary of State to accord Mr. Service the procedural benefits of the Foreign Service Act to which his employment was subject. 354 U.S. at 371, n. 12.[8] Again, these are considerations unrelated to petitioner's case.

Clearly, neither *Cole* v. *Young* nor *Service* v. *Dulles* provides authority for invalidating petitioner's removal. In neither case did the Court decide that loyalty or security considerations are not a valid ground for removing federal employees; and in neither case did the Court hold that employees who are unprotected by statute or regulation cannot be dismissed summarily, at will. In the *Service* case, the controlling inquiry was one addressed to the procedural regularity of the removal under the gov-

[8] 58 Stat. 390, as amended, 5 U.S.C. 863.

[9] See also, *Peters* v. *Hobby*, 349 U.S. 331, where the removal and debarment involved were effected by the Loyalty Review

erning regulation (354 U.S. at 373, 382–389); and in *Cole,* the Court was careful to note that "there [was] no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." 351 U.S. at 544.

While the original notification of petitioner's removal cited as authority the 1950 Act and Executive Order 10450, "it is important to note that that Act is not the only, nor even the primary, source of authority to dismiss Government employees." *Cole* v. *Young,* 351 U.S. 536, 543. Though petitioner's removal was not authorized by the 1950 Act, his dismissal—as distinguished from the notice of the dismissal—must nevertheless be sustained as a valid exercise of the appointive and removal powers of the Secretary of Interior derived from "the primary source"—the Constitution—and unrestricted (as we have demonstrated) by statute, regulation, or executive order. See *supra,* pp. 11–19. The dismissal itself was fully valid, even though it was not authorized by the 1950 Act. Citing the incorrect authority for the removal cannot affect the operative act of removing petitioner—an act which is sustainable under the Secretary's untrammeled authority to dismiss one in

Board of the Civil Service Commission in violation of Executive Order 9835 (12 Fed. Reg. 1935).

petitioner's unprotected position. Perhaps, in officially terminating petitioner's employment, references to the 1950 Act, the Executive Order, and the security regulations should not have been made since they indicate that petitioner's removal was based upon considerations of national security; but where the authority to remove is clear, the validity of the removal should not now turn upon the initial references to the security program which have been expunged (see *infra*, pp. 23–25). As in *Harmon* v. *Brucker*, 355 U.S. 579, petitioner's real complaint is not with his separation from the federal service, but against the characterization of that removal; just as Harmon could not have prevented his discharge from the military service on any grounds deemed valid by the military authorities, so petitioner cannot set aside his effective removal from the federal service.[10]

We doubt, finally, that petitioner, unprotected by statute or regulation, is entitled to demand an affirma-

[10] *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, and *Perkins* v. *Elg*, 307 U.S. 325, upon which petitioner relies as requiring a contrary result (Pet. Br. 35), are inapposite. First, those cases involve different fields of the law in which the claimants had greater rights and protections than are accorded to government employees-at-will subject to summary dismissal. Second, the scope of judicial review in the area of federal employment is the much narrower one of whether the employee's removal was effected in compliance with applicable procedural limitations, if any, upon the discretionary removal power of the employing authority (*supra*, pp. 12–15). Third, as indicated in the text, the ground asserted for removing petitioner was a proper ground, on its face; the difficulty was that that ground may have become public, not that it was the basis of the removal action; but a valid dismissal of an employee-at-will does not become unlawful simply because a reason may have been improperly published.

tive showing that his removal was based, as a substantive matter, on rational grounds. But if an affirmatively rational basis is essential to the exercise of the Executive's constitutional power of removal (cf. R. 42–44), the judicial record in this case is sufficient to require that petitioner's removal be upheld. Based on the evidence before him, the Secretary of Interior was of the view that petitioner was of questionable reliability and trustworthiness and that petitioner had deliberately misrepresented, falsified or omitted material facts in response to inquiries by the Department of Interior (R. 5–6, 29–31). As noted by the court below, the "power of the Executive to discharge for untrustworthiness or deliberate misrepresentation is beyond dispute, even under the here inapplicable Lloyd-LaFollette and Veterans' Preference Acts" (R. 43). *Williams* v. *Cravens*, 210 F. 2d 874, 875 (C.A.D.C.), certiorari denied, *sub nom. Williams* v. *Robbins*, 348 U.S. 819; *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A.D.C.), certiorari denied, 346 U.S. 937.

II

PETITIONER IS NOT ENTITLED TO RELIEF BEYOND THAT WHICH HAS ALREADY BEEN EXTENDED TO HIM

Though we deny the invalidity of petitioner's removal and the authority of a court to set it aside, we have conceded (as indicated above) that the respondents erred in citing the 1950 Act and Executive Order 10450 as authority for his dismissal. In addition, the Civil Service Commission has expunged its records "of all adverse findings made with respect to [petitioner] under Executive Order 10450" (R. 34). And

petitioner's personnel records on file with the Department of Interior, as of September 1956, no longer refer to Executive Order 10450; petitioner's removal, insofar as the records indicate, was effected without stated reason or cause (R. 33–34). In the light of the Government's concession and this corrective administrative action which has been taken, petitioner has no present right to additional relief, judicial or otherwise. As stated by the court below (R. 44): "We think that this voluntary action by the Government is equivalent to the maximum relief a court might have been justified in granting under all the circumstances of the case. See *Peters* v. *Hobby*, 349 U.S. 331; 349 (1955); *Service* v. *Dulles*, 98 U.S. App. D.C. 268, 272, 235 F. 2d 215, 219 (1956), reversed on other grounds, 354 U.S. 363 (1957)." The record now stands without any indication that petitioner, an employee-at-will, was removed for security reasons, and certainly not on loyalty grounds. Cf. *Lerner* v. *Casey*, 357 U.S. 468, 478; *Beilan* v. *Board of Education*, 357 U.S. 399, 409–411.

Petitioner, however, continues to urge (Br. 32–34) that, in addition to the relief voluntarily accorded him, he is entitled to reinstatement in his former position. But since no procedural or substantive rights of petitioner were violated by his removal (as such) in 1954, there is no basis for invalidating his 1954 removal, and consequently there is no right to reinstatement. Cf. *Peters* v. *Hobby, supra; Cole* v. *Young*, 351 U.S. 536; *Service* v. *Dulles, supra; Lerner* v. *Casey, supra; Beilan* v. *Board of Education, supra.*

There is another reason for not reinstating peti-

tioner. Even if his 1954 discharge were held to be invalid, petitioner's employment was effectively and validly terminated in 1956 by reason of the "Notification of Personnel Action" (R. 33–34), issued by the Department of Interior, giving no reason for the termination. *Supra*, pp. 6, 23–24. The pertinent circumstances presented by this case are not materially different than those in *Peters* v. *Hobby*, 349 U.S. 331, where the Court held that "reinstatement * * * cannot be granted, since it appears that the term of petitioner's appointment would have expired on December 31, 1953, wholly apart from his removal on loyalty grounds." 349 U.S. at 349; cf. *Service* v. *Dulles*, 354 U.S. 363. It follows that petitioner cannot rightfully claim to be reinstated at this time.[11] To the extent that he may have been wronged by the terms of his original dismissal notice, clearly all proper and practical remedial measures, within reason and right, have now been accorded him.[12]

[11] There is a substantial question whether petitioner's employment was not for a two-year term, which has now expired. His employment agreement bound him to serve for that period or such part thereof as his services might be needed (R. 27). Petitioner's claim is that this agreement dealt merely with his right to have the Government pay his transportation back to the mainland, and that it did not put a term on his appointment (Pet. Br. 5). The courts below did not pass upon this issue, and therefore we do not press it here.

[12] While petitioner, in his complaint, sought back-pay from the time of his removal to the date of reinstatement, if that should be ordered by the court (R. 17), it is clear that the District Court is, in any event, without jurisdiction of this aspect of petitioner's claim. *Bruner* v. *United States*, 343 U.S. 112; 28 U.S.C. 1346(d)(2), 1491. Since he was properly dis-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted.

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MARCH 1959.

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missed (in our view), he is not entitled to back-pay. Cf. *Leiner* v. *United States*, Ct. Cls. No. 576–57, decided October 8, 1958 (granting back pay to an employee in petitioner's position who was reinstated after *Cole* v. *Young*).

APPENDIX

The Act of August 26, 1950 (64 Stat. 476–477, 5 U.S.C. 22–1, 22–3) provides, in pertinent part, as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U.S.C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, ~~Department~~ of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided,* That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any state-

ments or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such

person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

* * * * *

SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

* * * * *

EXECUTIVE ORDER 10450 [18 F.R. 2489, as amended]

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SEC. 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency

of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person oc-

cupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further,* that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or

retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefore, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to over-

throw the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and

agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted

upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of

representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any such deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Civil Service Commission in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the

Commission as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Civil Service Commission is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,

April 27, 1953.

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, November 9, 1953.

ORDER No. 2738

SUBJECT: SECURITY REGULATIONS

GENERAL

Sec. 1. Purpose.—(a) If the duly constituted Government and the national Security of the United States are to be protected and made secure, it is imperative that all persons engaged in any capacity in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. This order is issued so that the Department of the Interior may have a program designed to insure that the personnel in its employment meet the minimum requirements considered

necessary to protect and make secure the Government and the national security.

(b) The regulations in this order are designed to achieve two objectives; first, to make sure that all employees are unquestionably and trustworthy in their capacity as citizens engaged in government activities conducted under our constitutional form of government, second, to guard security information or material, the disclosure of which, would have an adverse effect on national security.

(c) This order prescribes for all bureaus and offices of the Department the procedures, standards and criteria for carrying out these objectives and are issued in accordance with the act of August 26, 1950 (5 U.S.C. 1946 ed., Supp. V, secs. 22–1, 22–2, 22–3), and Executive Order 10450, of April 27, 1953 (18 F.R. 2489), as amended.

* * * * *

Sec. 3. Policy—(a) It shall be the policy of the Department, based on the act of August 26, 1950 (64 Stat. 476) and Executive Order No. 10450 of April 27, 1953, as amended, to employ and to retain in employment only those persons who are reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States in their capacity as citizens engaged in government activities conducted under the constitutional form of Government of the United States.

(b) No person shall be employed, or retained as an employee, in the department unless the employment of such person is clearly consistent with the interests of the national security.

* * * * *

Sec. 6. Security Investigations— * * *

* * * * *

(c) *Temporary and Intermittent Employees*—Certain employees in non-sensitive positions whose term of employment is for 6 months or less are, subject to the approval of the Civil Service Commission, exempted from the investigations normally required for non-sensitive positions. Special instructions will be issued concerning such employees by the Director of Security.

* * * * *

Sec. 13. Termination of Temporary and Probationary or Trial Employees—The regulations in this order are not intended to take away any authority which the appointing officer may have to terminate, for cause, temporary and probationary or trial employees.

Sec. 15. Notification to Employee of Suspension or Reassignment—(a) A written statement of charges shall be furnished the employee within 30 days after his suspension or temporary reassignment. The statement shall also inform the employee of his privileges under Sec. 16 and if appropriate Sec. 17 of this order. This statement shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit, and shall be subject to amendment within 30 days of issuance.

(b) A copy of these regulations shall accompany the statement furnished the employee. The text of Executive Order 10450 and the act of August 26, 1950, are included in these regulations as Appendix C and D respectively.

Sec. 16. Appeal Procedure—(a) An employee shall be afforded an opportunity to submit affidavits and statements and to answer such charges within 30 days after the receipt of the statement of such charges, or

within 30 days after the receipt of an amendment thereof.

(b) Statements in refutation of the charges and supporting documents shall be considered by the Security Legal Officer and the Director of Security, who shall make a joint recommendation to the Secretary for the disposition of the case. If the Security Legal Officer and Director of Security are in disagreement, individual recommendations shall be made by them.

(c) Final decision as to termination of the employee will be made by the Secretary.

(d) A written statement of the decision of the Secretary shall be furnished the employee.

(e) Copies of notices of all personnel actions taken in the case shall be supplied by the bureau or office to the Civil Service Commission.

Sec. 17. Further Appeal Rights—Permanent or Indefinite Employees—An employee who is suspended or temporarily reassigned and who is a citizen of the United States and has a permanent or indefinite appointment and has completed his probationary or trial period shall, if he requests, be given a hearing before a security hearing board, constituted and conducting hearings as provided in this order. The decision of the hearing board will be reviewed and considered by the Secretary before a determination is made with respect to the termination of the employee.

* * * * *

Sec. 21. Hearing Procedure—The following hearing procedure shall be strictly adhered to—(a) Hearings before security hearing boards shall be conducted in an orderly manner and shall be expedited as much as possible.

(b) Testimony before the hearing boards shall be given under oath or affirmation.

(c) The hearing board shall take whatever action is necessary to insure the employee of a full and fair consideration of his case. The employee shall be informed by the board of his right:

(1) To participate in the hearings;

(2) To be represented by counsel of his choice;

(3) To present witnesses and offer other evidence in his behalf and in refutation of the charges brought against him; and

(4) To cross-examine any witness offered in support of the charges.

* * * * *

(e) Both the Department and the employee may introduce such evidence as the hearing board may deem proper in the particular case. Rules of evidence shall not be binding on the board, but reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered, so that the hearings shall not be unduly prolonged. If the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration. If a person who has made charges against the employee and who is not a confidential informant is called as a witness but does not appear and refuses either to permit his deposition to be taken or to answer written interrogatories, his action in this regard shall be considered by the board in evaluating such charges.

* * * * *

(i) Hearing boards shall conduct the hearing proceedings in such manner as to protect from disclosure

information affecting the national security or tending to disclose or compromise investigative sources or methods.

* * * * *

(k) The board shall reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession. The conclusions and recommendations of the Board with respect to the employee against whom the charges have been made should specifically include a recommendation that the services of the employee be terminated or that termination is not warranted. The board, in making its determination, shall take into consideration the inability of the employee to meet charges of which he has not been advised because of security reasons, specifically or in detail, or to attack the credibility of witnesses who do not appear. The recommendations of the board shall be in writing and shall be signed by a majority of the members of the board. The recommendations of the board, and the complete record of the case, including investigative reports, shall be sent to the Secretary for use in his final review of the case.

* * * * *

Sec. 22. Revocations—This order supersedes all previous Departmental security regulations and Secretarial Orders Nos. 2308, as amended, 2459, 2460, 2488, 2489, 2490, as amended, 2491, 2538, and sections 6 and 7 of 2309, as amended.

/s/ DOUGLAS MCKAY,
Secretary of the Interior.

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No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM VINCENT VITARELLI, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINIONS BELOW

The order of the United States District Court for the District of Columbia (R. 52) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit and the dissenting opinion of Judge Fahy (R. 53–60; Pet. App. 41–48) are reported at 253 F. 2d 338.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958 (R. 61; Pet. App. 40). On May 5, 1958, by order of the Chief Justice, the time

for filing a petition for a writ of certiorari was extended until June 13, 1958. The petition for a writ of certiorari was filed on June 12, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal government employee without tenure in a nonsensitive position who was discharged pursuant to procedures provided by law for sensitive positions only and subsequently, without reinstatement, again discharged, this time without characterization as a "security risk," has any present right to a declaratory judgment or to reinstatement.

STATUTES AND REGULATIONS INVOLVED

Sections 1 and 3 of the Act of August 26, 1950 (64 Stat. 476–477, 5 U. S. C. 22–1, 22–3) are set forth in the Appendix, *infra*, pp. 11–13. Executive Order 10450, issued April 27, 1953, is set forth at Pet. App., pp. 26–27. Department of the Interior Order 2738, dated November 9, 1953, is set forth in pertinent part at Pet. App., pp. 28–33.

STATEMENT

On September 10, 1952, the petitioner, a nonveteran, was appointed by the Department of Interior, Office of Territories, as an Education and Training Specialist on the Pacific Island of Koror (R. 40–41). Since this position was within Schedule A of the Civil Service regulations and therefore excepted from classified civil service, it did not confer civil service status on the petitioner (R. 41). Rather,

the petitioner signed an agreement to serve for twenty-four months, "or such part thereof as [his] services may be needed" (R. 42).

On April 2, 1954, the petitioner was suspended and served with written charges by the Secretary of the Interior pursuant to the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1, Executive Order No. 10450, 18 F. R. 2489, and Department of the Interior Order No. 2738[1] (R. 12–15). The charges, in general, were that the petitioner was "either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party" (R. 12) and that he might be "subjected to coercion, influence, or pressure which [might cause him] to act contrary to the best interests of national security" (R. 15).

The petitioner answered the charges with forty-four supporting affidavits (R. 24, 35), but was informed by the Secretary on June 11, 1954, that his answer and supporting documents did not constitute sufficient grounds to reinstate him (R. 24, 35). The petitioner was thereafter given a hearing before a security hearing board at which he was represented by counsel (R. 24, 35, 45). At that hearing, four witnesses testified in petitioner's behalf (R. 25, 35).

On September 2, 1954, the Secretary accepted the recommendation of the hearing board "that the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security" and

[1] The suspension long antedated this Court's decision in *Cole v. Young*, 351 U. S. 536, and the Secretary cited these sources despite the fact that petitioner's position was nonsensitive.

ordered that the petitioner's employment be terminated as of September 10, 1954 (R. 44–46). Although a rehearing was granted, and additional testimony taken before the personnel officer of the Interior Department Office of the Territories, the Secretary again refused reinstatement on May 11, 1956 (R. 27, 36).

On June 11, 1956, this Court decided, in *Cole* v. *Young*, 351 U. S. 536, that the Act of August 26, 1950, and Executive Order 10450 were inapplicable to a non-sensitive position such as the petitioner's. On the following day, the petitioner again demanded reinstatement (R. 27, 37).

On July 10, 1956, the petitioner instituted this action against the respondents Secretary of the Interior and the Civil Service Commissioners seeking (1) a declaratory judgment that his discharge was illegal; and (2) a mandatory injunction directing reinstatement, back pay and the expunging of all records pertaining to petitioner's discharge (R. 21–32). Shortly thereafter, the Civil Service Commission voluntarily expunged from its records all indication that the petitioner was dismissed for security reasons (R. 48–49). In place of the prior termination notice, the Department of the Interior substituted a new notice, bearing the same date as the original, which did not suggest the reason for the petitioner's dismissal (R. 47–48).

The district court, on cross motions for summary judgment, dismissed the complaint (R. 52). The Court of Appeals affirmed, Fahy, J., dissenting (R. 53–60; Pet. App. 41–48). It held that the security risk discharge procedures provided by the Act of

1950, Executive Order No. 10450, and Departmental Order 2738 were prescribed for the discharge of employees in sensitive positions who normally would be entitled to even greater procedural protection under other statutes such as the Lloyd-LaFollette or Veterans' Preference Acts (Pet. App. 43–44). However, since the petitioner was not a veteran nor otherwise protected in the tenure of his employment, he was subject to dismissal without cause and therefore not entitled to the benefit of the Act of 1950 and the Executive Orders implementing it (Pet. App. 44). At most, he was entitled not to be discharged for "flagrantly arbitrary" or unconstitutional grounds and dismissal as a security risk was neither "flagrantly arbitrary" not unconstitutional *per se* (Pet. App. 44–45).[2] Moreover, the procedure utilized by the Secretary, including formal written charges, an opportunity for the petitioner to answer, and a hearing at which the petitioner was represented by counsel and presented witnesses, clearly afforded the petitioner due process (Pet. App. 45). Therefore, although the Secretary erred in citing the Act of 1950 and implementing executive orders as the authority for the discharge proceedings, the discharge was nevertheless valid (Pet. App. 46). Moreover, one of the grounds for dismissal—that the petitioner was "not reliable or trustworthy" and had "deliberately misrepresented * * * material facts"—furnished an adequate

[2] As this Court observed in *Cole* v. *Young*, 351 U. S. 536, the question was "not whether an employee *can* be dismissed on such grounds but only the extent to which the summary procedures authorized by the 1950 Act are available in such a case," id. at 544.

basis for dismissal regardless of the questions raised concerning the security discharge procedures (Pet. App. 46–47).

As a further ground for affirmance, the court noted that the respondents had already afforded the petitioner the full relief to which he would be entitled even if the 1954 discharge were invalid (Pet. App. 47). In this connection, it pointed to the facts that the Civil Service Commission voluntarily has expunged all records of findings that the petitioner was a security risk and that the Department of the Interior has substituted a second termination notice which omitted all reference to discharge for security reasons (Pet. App. 47).

ARGUMENT

1. The Court of Appeals correctly held that there is no effective relief to which the petitioner is entitled, regardless of the validity of the 1954 dismissal. It is clear that he is not now entitled to reinstatement. As he concedes (Pet. 12), in view of his status as a non-veteran in an excepted position, he was subject at all times to summary discharge without cause. In these circumstances, the second termination notice, which made no reference to the Act of August 26, 1950, Executive Order No. 10450 or Departmental Order 2738, was plainly valid.[3]

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[3] In *Peters* v. *Hobby*, 349 U. S. 331, this Court noted that reinstatement was not available to petitioner because his term of office had expired, *id.* at 349. Similarly, the petitioner here cannot be reinstated because he has been dismissed properly subsequent to the allegedly illegal discharge.

The petitioner's argument that the second dismissal was ineffective because he was no longer an employee when the

There is no other relief which could be granted to petitioner. The records of the Civil Service Commission have been expunged of all references to the petitioner as a security risk and now indicate simply that he was summarily discharged. Cf. *Peters* v. *Hobby*, 349 U. S. 331. And the district court lacked jurisdiction to entertain the petitioner's claim for back pay. *Bruner* v. *United States*, 343 U. S. 112; 28 U. S. C. 1346 (d) (2), 1491.

The only possible relief remaining would be a declaratory judgment that the procedure under the 1950 Act was improperly applied to the petitioner. Since this is conceded and, as stated above, the records have been corrected, there is no necessity for granting review in order to accord such relief.

2. This Court has recently observed that the Act of 1950 "is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-LaFollette and Veterans' Preference Acts—authorize dismissals for 'such cause as will promote the efficiency of the service.' * * *." *Cole* v. *Young*, *supra*, at 543. However, Congress, in the Act of 1950, limited the procedural rights of employees covered by these Acts in cases where national security was the basis for suspension and subsequent dismissal. The purpose of the Act clearly was not to expand the administrative rights

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otherwise valid termination notice was issued, is self-defeating. Either the first discharge was proper and the petitioner was legally discharged, or the 1954 discharge was invalid and the petitioner was, for purposes of legal termination of his services, still subject to dismissal.

of employees who were not covered by the Lloyd-LaFollette and Veterans' Preference Acts, but rather to limit the rights of employees who were protected by those Acts.[4]

Absent the Act of 1950, the petitioner, as a non-veteran Schedule A employee, was not entitled to be served with charges nor to secure a hearing prior to discharge. Therefore, the Act of 1950 and Executive Order No. 10450 cannot be the bases for requiring that he be afforded the procedures they prescribe. In spite of this, the petitioner contends that he was not afforded his full rights under the Interior Department Order 2738 implementing Executive Order No. 10450. As is pointed out below, the procedures set out by the regulations were in fact followed. However, since petitioner was a non-veteran Schedule A employee, he had no right to those procedures.[5]

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[4] "The purpose of the bill is to *increase* the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action." (Emphasis added.) S. Rept. No. 2158, 81st Cong., 2d Sess., p. 2.

[5] Although as a non-veteran Schedule A employee petitioner was subject to summary discharge, we do not contend that the Secretary of the Interior properly could have refused to expunge from the records the characterization of petitioner as a "security risk" nor that petitioner properly could have been prospectively barred from competitive Civil Service without some type of administrative proceeding. Therefore, although petitioner correctly notes that the petitioner in *Peters* v. *Hobby*, 349 U. S. 331, was a non-veteran Schedule A employee like petitioner, the critical facts that Dr. Peters' records indicated

3. Moreover, even though petitioner was a non-veteran Schedule A employee, and therefore not entitled to the procedures prescribed by Department Order 2738, the Secretary did, in fact, comply with those procedures in dismissing him.

The Secretary's charges furnished to petitioner were by no means simply conclusory assertions. Rather, they were specific charges of concealed intimate friendships with two named Communist sympathizers, registration in 1945 with an allegedly communist controlled political party, and subscription to Communist publications. On the basis of these specific acts, the Secretary concluded that the petitioner's "behavior, activities and associations tend to show that [he is] not reliable or trustworthy" and that there was "reason to believe that [petitioner] deliberately misrepresented, falsified or omitted material facts in connection with [his] behavior, activities and associations, and [that petitioner] may be subjected to coercion, influence, or pressure which may cause [him] to act contrary to the best interests of national

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that he had been discharged for security reasons and that the Loyalty Review Board had imposed a three-year bar to his employment in competitive Civil Service distinguish the *Peters* case from the present petition.

Service v. *Dulles*, 354 U. S. 363, is also inapposite since the Secretary's power to summarily discharge Mr. Service under the McCarran Rider was expressly limited by the Departmental Regulations prescribing procedures for security risk discharges, *id.* at 373–376. Similarly, *Cole* v. *Young*, 351 U. S. 536, is inapplicable since Mr. Cole was a veteran's preference eligible, *id.* at 539.

security." Especially in view of the direction in the Departmental Order that the statement of charges "shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit", these charges were sufficiently precise to permit refutation by the petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys.

JULY 1958.

APPENDIX

The Act of August 26, 1950 (64 Stat. 476–477, 5 U. S. C. 22–1, 22–3) provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U. S. C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by

the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head; *Provided further*, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such

person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

* * * * *

SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

* * * * *

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BRIEF FOR THE PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 104

WILLIAM VINCENT VITARELLI,
Petitioner,

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, FREDERICK J. LAWTON, and BARBARA BATES GUNDERSON, Members of the Civil Service Commission of the United States,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 101

WILLIAM VINCENT VITARELLI,
Petitioner

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, FREDERICK J. LAWTON, and BARBARA BATES GUNDERSON, Members of the Civil Service Commission of the United States,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum of the Secretary of the Interior suspending petitioner under the purported authority of the Act of August 26, 1950, E. O. 10450 and Department Order 2738 is printed at R. 3-6. The "findings and final determination" of respondent Secretary, dated September 2, 1954, ordering the termination of petitioner's employment "in the interest of national security," is printed at R. 29-31. The order of the District Court, dated October 29, 1956, is unreported and is printed at R. 37-38. The

opinion of the Court of Appeals is reported at 253 F 2d. 338 and is printed at R. 38-45.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958. On May 5, 1958, Chief Justice Warren issued an order ex parte extending the time to file petition for certiorari until June 13, 1958. R. 47. The petition for a writ of certiorari was filed on June 12, 1958, and granted on October 27, 1958. R. 48.

QUESTIONS PRESENTED

In filing his suit in the District Court petitioner sought (i) a declaratory judgment that his suspension and removal by respondent Secretary as a "security risk" under the purported authority of the Act of August 26, 1950, E. O. 10450, and Department Order 2738 be set aside as illegal and void, and (ii) a mandatory injunction directing petitioner's reinstatement to his position as educational officer in the Department of the Interior, with all the rights incident thereto. Respondents thereupon voluntarily expunged the records of the Department of the Interior and the Civil Service Commission of "all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450." The case was heard on cross motions for summary judgment at the conclusion of which the District Judge granted summary judgment for respondents on the ground that the court could not order the reinstatement of an employee whose tenure "is only at the will of the employing Government." R. 37. The Court of Appeals affirmed on the ground that the treatment accorded petitioner "was in no way arbitrary, or lacking in due process", that he "was legally discharged, even though the proceedings were improperly labelled," and that the voluntary expunging of the records, which had already been effected, was "the maximum relief" to which

petitioner was entitled. R. 42-44. The questions presented are:

1. Whether a defamatory "security risk" removal violates petitioner's constitutional rights where made under wrongfully invoked authority or merely amounts to what the court below termed "improperly labelled" proceedings against an employee lacking statutory job rights?

2. Whether, in the latter event, a finding of "untrustworthiness" by respondent Secretary, purportedly made in a "security" proceeding, survives a voluntary expunging by respondents of all records of "any adverse statements" with respect to the termination of petitioner's employment, so as to furnish a "rational" foundation for removal and denying petitioner reinstatement?

3. Whether respondent Secretary, have specifically subjected petitioner to the formalities of a hearing conducted "in the interest of the national security," furnished petitioner with (a) charges stated with sufficient specificity so as to enable petitioner, on the assumption of innocence, to prepare an adequate defense, and (b) a fair and impartial hearing free from partisanship?

4. Whether the "security risk" dismissal of a concededly loyal educator from a "non-sensitive" position—involving no element of the national security—can be effected after the formalities of a "hearing" solely on the basis of secret reports?

5. Whether respondent Secretary, who had discharged petitioner in 1954 as a "security risk", confessedly under the wrongfully cited authority, could discharge petitioner again two years later (1956) after the institution of this suit in the District Court by the device of issuing a predated second discharge paper and expunging the references to petitioner's being a "security risk," or is petitioner entitled first to reinstatement?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves:

(1) The Fifth Amendment to the Constitution of the United States, printed in Appendix A, *infra*, p. 38.

(2) E. O. 10450, issued April 27, 1953, printed in Appendix A, *infra*, pp. 38-39.

(3) Department of the Interior Order No. 2738, Security Regulations, dated November 9, 1953, printed in Appendix A, *infra*, pp. 40-45.

STATEMENT OF THE CASE

This case comes to this Court from the affirmance of the order of the trial court which granted respondent's motion for summary judgment, dismissed the complaint, and denied petitioner's motion for summary judgment. R. 37-38.

Neither party introduced testimony in the trial court.[1]

Petitioner, a citizen of the United States, residing in Erwinna, Bucks County, Pennsylvania, is a professional educator, holding a doctor's degree from Columbia University, who was employed by the Department of the Interior in the Education Department of the Trust Territory of the Pacific Islands, at Koror in the Palau District. Under the general employment policy of the Government for overseas personnel outside the Foreign Service, peti-

[1] Save for such references to a newspaper clipping (R. 1-2), the letter of charges (R. 3-6), and the transcript of the so-called hearing before the security hearing board as are necessary to explain how this case arose, the statement of the case is based on the facts of record. The essentials of the security hearing were also set forth in testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on November 23, 1955, and printed as part of its proceedings pursuant to S. Res. 94, 84th Congress, 2nd Session, pp. 653-71.

tioner held a so-called "Schedule A" position excepted from the classified civil service, had completed his trial period, and held an "indefinite appointment."[2] Petitioner's duties consisted of administering and fostering an educational program for the native people of the Palau District of the Trust Territory, including teacher training and the preparation of teaching materials. R. 8. He had rendered full and completely satisfactory service in his position as education and training specialist, which he had held for some three years, had received official ratings of "satisfactory" and "excellent," and had secured from his superiors many favorable commendations, which were presented in evidence to the so-called security hearing board. R. 9. At the time of his suspension in 1954, petitioner was receiving a salary of $6,140 per year plus 25% overseas differential. Respondents have conceded that his position at no time had been designated a "sensitive position." R. 19.

Petitioner first learned of his probable suspension from the headlines of a Guam newspaper under date of March 13, 1954 (R. 12), which stated: "Security Probe in Trust Isles—Five Employees Will Be Ousted as 'Bad Risks,'" and listed one as a "known conscientious objector" who as "an advocate of pacificism is out of place in so sensitive and strategic an area as the Trust Territory." This public reference to petitioner, whose pacificism was well known

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[2] The record contains the text of a so-called "employment agreement" (R. 26-29) which was designed to protect the Government in the matter of travel expenses by requiring petitioner to reimburse the Government in the event he cut his overseas employment short of the minimum term of two years. It has nothing whatever to do with petitioner's tenure in the Department of the Interior. According to the testimony of the personnel officer of the Department of the Interior, who originally effected the employment of petitioner, as reported in an official "Transcript of Proceedings" on November 14, 1955, "The mere fact that the minimum period required of Dr. Vitarelli as basis for his transportation would not in itself act to terminate his employment." P. 27.

in the Islands, thus commenced the official defamation of petitioner. While petitioner's pacificism was not subsequently cited in the formal charges against him, it still remained the subject of probing at the hearing before the so-called security hearing board. Approximately one month later, on or about April 3, 1954, petitioner received an abstract of a letter from respondent Secretary, suspending him, without at that time stating any of the charges. The full text of the letter setting forth certain charges against him was received on or about April 8, 1954. R. 3-6.

The formal charges listed against petitioner may be summarized as follows: (1) During the years 1941-45 he was either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party, including sympathetic association with three named individuals [para. 2(a)(1)];

(2) That in 1945 he had registered a preference for the American Labor Party in New York City [para. 2(a)(2)];

(3) That while teaching at Teachers College of Columbia University he had subscribed to the U. S. S. R. Information Bulletin and had purchased copies of the Daily Worker and the New Masses [para. 2(a)(3)];

(4) That a statement submitted by petitioner under oath in 1952 with respect to his associations with two named individuals did not fully divulge his associations with such individuals in that his association with one individual was "not casual" as he stated in 1952, but on the contrary was one of "an intimate friendship," that his association with another individual was not limited solely in connection with his teaching profession, and that he knew both individuals to be "members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations" [para. 2(a)(4)]; and

(5) That his behavior, activities and associations tend to show him "not reliable or trustworthy" and that the foregoing allegations furnish reason to believe that he had "deliberately misrepresented, falsified or omitted material facts" in connection with his behavior, activities and associations, and that the same may "also furnish reason to believe that [petitioner] may be subjected to coercion, influence, or pressure" which may cause him "to act contrary to the best interests of national security." [Para. 3]. Petitioner was also advised of his right to answer and request a hearing within 30 days.

When petitioner requested travel authority to proceed from Koror to Washington, D. C., he was initially denied such authority "at Government expense unless resigning." R. 9. After seeking to borrow travel funds in Koror, petitioner was later authorized to proceed to Washington at Government expense for the purpose of answering the charges. Perforce petitioner left his wife and four children in Koror where they remained separated from him by thousands of miles for many months, dependent upon such funds as petitioner could send from his scanty earnings on odd jobs in the Washington area, while he prepared for his defense to the charges, attended the hearings, and waited for the decision of respondent Secretary, with all the attendent difficulties of familial communications over half the world during these most trying days for petitioner.

Petitioner filed with respondent Secretary a written answer, together with 44 affidavits concerning his loyalty and character, but was informed on June 11, 1954, that there were not "sufficient grounds to reinstate" him. On June 22 and July 1, 1954, petitioner, together with counsel and four witnesses, appeared before a so-called security hearing board. R. 10. Petitioner was not confronted with any evidence against him and did not have the right to subpeona witnesses, or to cross-examine his accusers,

whoever they might be. Nor was he given the text of the statements that had allegedly been made against him.

In his testimony petitioner categorically denied membership in or affiliation or sympathetic associations with the Communist Party or its sympathizers and gave a complete, candid and factual explanation of the matters contained in the written charges. The security officer of the Department of the Interior conceded on the record that, petitioner's loyalty was not in issue, as appears from the following exchange:

> "Mr. Olmsted [then counsel for appellant]: * * * Does Mr. Armstrong [then assistant solicitor and security officer, Department of the Interior] question his loyalty to the United States?
>
> Mr. Armstrong: No, I think I perhaps didn't elaborate my very first statement this morning sufficiently. * * * Of course, in the *Oppenheimer* case the board recommended to AEC to dismiss him as a security risk although they said he was perfectly loyal.
>
> Mr. Olmsted: That is why I am asking here, is it agreed that he is perfectly loyal or should I produce some evidence that he is perfectly loyal?
>
> Chairman Towson [who presided at hearing]: The only thing before this Board is incorporated in the letter of charges. As I recall he is not charged with disloyalty.
>
> Mr. Armstrong: That is right. The question is only whether he is a security risk." [Transcript of hearing, pp. 175-76].

The conclusion from the foregoing is obvious that the representative of the Department of the Interior at the so-called security hearing said twice that petitioner's loyalty was not in question.

The transcript of the hearing shows that petitioner was examined in particular on whether he thought the security

program was a Republican plot to get rid of Democrats,[3] on racial equality,[4] on discrimination against Jews,[5] on whether he had "heard of a great variety of organizations which were not listed in the letter of charges,[6] on Black Mountain transcendentalism,[7] whatever that may be, on his votes for President and Vice-President, on whether he was "quite happed up over the one-world idea,"[9] and whether he was "still [i.e., June 1954] a "strong advocate" of the United Nations."[10]

On September 2, 1954, respondent Secretary issued his "Findings and Final Determination" (R. 29-31) that it

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[3] "Mr. Armstrong [then assistant solicitor and security officer for the Department of the Interior]: Do you think that the Security program undertaken by Executive Order 10450 is politically inspired from the Republican administration?" Transcript, p. 15.

[4] "Mr. Armstrong: What were your feelings at that time [1943] concerning race equality?" Ibid., p. 24.

[5] "Mr. Armstrong: Do I interpret your statement correctly that maybe Negroes and Jews are denied some of their constitutional rights at present?" Ibid., p. 32.

[6] "Mr. Armstrong: Do you recall an organization by the name of National Council for Soviet-American Friendship? * * * How about the Southern Conference for Human Welfare? * * * What is the organization called the Joint Anti-Fascist Refugee Committee? * * * Have you ever had any contact with the Negro Youth Congress? * * * How about Abraham Lincoln Brigade? * * Did you become active in the Progressive Party in that year (1948)? * * * Have you ever heard of a magazine called 'Cooperative Union'? * * * I was wondering whether you had ever heard of Consumers Union?" Ibid., pp. 98, 100, 101, 102, 103, 112, 113.

[7] "Mr. Armstrong: Do you know what Black Mountain transcendentalism is?" Ibid., p. 97.

[8] Infra., pp. 29-30.

[9] "Mr. Armstrong: The file indicates, too, that you were quite hepped up over the one-world idea at one time; is that right?" Ibid., p. 131.

[10] "Mr. Armstrong: At one time, or two, you were a strong advocate of the United Nations. Are you still?" Ibid., p. 132.

was "advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954," without stating which of the charges, if any, were sustained against him. Petitioner's employment was terminated as of the close of business on September 10, 1954. Standard Form 50 of the United States Civil Service Commission, entitled "Notification of Personnel Action," was issued under date of September 21, 1954 (R. 31-32), designating the personnel action with respect to petitioner as "TERMINATION" and "being taken in accordance with the provisions of Executive Order 10450." This completed the process of labelling petitioner "a security risk."

Subsequent to the removal of petitioner, his original counsel (who has remained of counsel until his recent judicial appointment), was officially informed by the Solicitor of the Department of the Interior that petitioner had been removed because of an investigative report which had been received at the Department of the Interior after the filing of the formal letter of charges, which did not necessarily reflect the contents of such investigative report. R. 11-12. An entirely different explanation was later given to petitioner's original counsel by the personnel officer for the Trust Territories of the Department of the Interior to the effect that petitioner had not been removed for any subversive association or activity, but because petitioner had exhibited "lack of common sense" during his employment by the Department of the Interior in the South Pacific in permitting his children to freely associate with native children. R. 12.

By petition presented to the then Undersecretary of the Interior on October 25, 1955, petitioner applied for reinstatement or a rehearing, which was denied on May 11, 1956. On June 12, 1956, petitioner by his counsel made a written demand upon respondent Secretary to restore him

to duty forthwith in accordance with the decision of this Court in *Cole* v. *Young*, 351 U.S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956), but respondent Secretary failed to comply with this demand, whereupon petitioner brought action in the United States District Court for the District of Columbia on July 10, 1956.

Pursuant to the Rules of Civil Procedure, petitioner gave notice to respondents for the taking of oral depositions of certain officials of the Department of the Interior and the Civil Service Commission, listing specific matters of inquiry as peculiarly within the knowledge of respondents. The scope of the discovery and the opposing reasons were, inter alia, set forth by petitioner and respondents as follows:

A. Petitioner's discovery.	B. Respondents' reasons for opposing discovery.
7. Why was not plaintiff simply removed without charges, without procedures and without infamy in view of his lack of competitive status under a Schedule A appointment?	7. and 8. . . . These questions clearly relate to matters which are hypothetical and immaterial. The only relevant legal issue herein is whether the procedures in fact employed by the defendant Secretary in accomplishing plaintiff's discharge were legal and valid. Neither the existence of any other procedure which could have been used to discharge plaintiff nor the reason why it was not in fact employed can have any possible relevance herein.
8. Why did defendant Secretary insist upon imposing "a badge of infamy" on plaintiff by making a finding that the employment of plaintiff be "terminated in the interest of the national security" under the purported authority of E. O. 10450 and the Act of August 26, 1950?	

On October 1, 1956, noting the above quoted language of respondents in 7 and 8 "on the understanding that this is a concession of record and binds the Defendants not to depart from that position," petitioner thereby withdrew his opposition to respondents' motion for a stay of discovery proceedings and filed a cross motion for summary judgment.

On October 10, 1956, respondents filed in the District Court an affidavit by the personnel officer of the Office of Territories in the Department of the Interior, who stated that she had custody of the personnel file of petitioner and that "Standard Form 50 attached hereto and made a part hereof is a true copy of the official document reflecting the termination of William Vincent Vitarelli from a position under the jurisdiction of said Office of Territories." R. 32. This attached form (R. 33-34) was an exact duplicate of Form 50 which had been issued to petitioner in 1954 (R. 31-32), except for the deletion under "remarks" of the sentence referring to action being taken pursuant to E. O. 10450. There is nothing on the face of this new Form 50 to show that it was not issued on September 21, 1954, or that it was issued in fact sometime in October, 1956.

On October 16, 1956, the case was heard on cross motion for summary judgment, at the conclusion of which United States District Judge James W. Morris ruled that he would grant summary judgment for the respondents because he questioned whether he possessed the power to order the reinstatement of a governmental employee whose tenure was at the will of the employing department and as such excepted from the protection available to employees in the classified civil service (R. 34-38). The Court of Appeals affirmed the case on February 13, 1958 (R. 38-46).

The Court of Appeals has held: (a) that while a governmental employee lacking statutory job protection is "en-

titled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds," the treatment of petitioner by respondent Secretary "was in no way arbitrary or lacking in due process" and that petitioner had been "legally discharged even though the proceedings were improperly labelled" as a security proceeding; (b) that one of the grounds of dismissal furnished a "clear basis" for the Secretary's action in removing petitioner, namely untrustworthiness, and that courts properly refuse to review the evidence or to examine the merits of an executive finding of untrustworthiness; (c) that a charge of untrustworthiness survives the voluntary expunging from the record of "any adverse findings" under a security proceeding; (d) that the removal of petitioner was not limited by the Act of August 26, 1950, or any other statute or regulations; and (e) that the maximum relief to which petitioner would be entitled would be the expunging of the record, which had already occurred, and that petitioner in no event would be entitled to reinstatement.

The dissent by Judge Fahy found that the charge of untrustworthiness could not be read "as in any sense independent" of the expunged charges which had been made under E. O. 10450 and the Act of August 26, 1950; that under the ruling of this Court in *Cole* "the basis for the original termination disappears, and with it the validity of that termination"; and that the second termination notice "could not relate back as attempted."

SUMMARY OF ARGUMENT

The prime issue here presented is the scope of the constitutional rights of an American educator to pursue his profession of teaching free of any "improper labelling" with a "badge of infamy" as a consequence of his removal as a so-called "security risk" from an admittedly non-sensitive position by the Secretary of the Interior in

1954. The issue is constitutional rather than statutory because petitioner lacks job protection under the Lloyd-LaFollette Act, the Veteran's Preference Act or the Foreign Service Act. He has a modicum of rights under the Act of August 26, 1950, even though the summary powers conferred upon the Executive under that Act were limited to employees holding sensitive positions, because the Secretary of the Interior applied that Act to him in the first instance and in justice he then should be entitled to the remedial provisions of that Act, e. g., authorization for back pay. *Leiner* v. *United States*, —— Ct. Cls. —— No. 376-57, October 8, 1958.

The Government argued below, and the courts below upheld the Government, that this Court's decision in *Cole* v. *Young*, 351 U. S. 536, 100 L. Ed., 1396, 76 S. Ct., 861 (1956), that a Governmental employee in a non-sensitive position could not be summarily removed under the Act of August 26, 1950, does not avail petitioner because his position in the Department of the Interior was excepted from the classified civil service and because he was not a veteran; and accordingly, the Government argued successfully in the courts below that petitioner had no rights under either statute or a departmental regulation which were violated by his removal.

Petitioner's argument on this appeal is four fold:

1. Petitioner has a constitutional right not to be defamed without lawful authority. An unjustified branding of him as a "security risk" was and has remained defamatory of petitioner in the pursuit of his professional calling, unless such defamation can be justified by a plea of the truth in a due-process hearing. Here respondents have no plea of "truth", for the record of the so-called security hearing is devoid of any evidence against petitioner. The only evidence of record in that hearing is favorable to the petitioner.

2. Having voluntarily expunged the official records of all statements adverse to petitioner, respondent Secretary lacked a rational foundation of record for finding petitioner to be untrustworthy. The court below said that charges of untrustworthiness and deliberate misrepresentation were ample grounds for removal and that these grounds were found to have been sustained on the evidence before respondent Secretary. But since the record has already been voluntarily expunged of all adverse findings made with respect to petitioner, what then can be said to remain in justification of the removal action by respondent Secretary? If the Government were then to contend that it had a general right of dismissal without giving any ground and that this right was exercised to remove petitioner, the question is raised when was such a right exercised? Certainly it was not exercised when petitioner was fired as a "security risk" in 1954.

3. When respondent Secretary issued Department Order 2738 and by its terms made it applicable to *all* "security" removals, respondent Secretary thereby limited whatever rights he might otherwise have possessed to remove employees on security grounds, as was held by this Court in *Service* v. *Dulles*, 354 U. S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957). The effort of the court below to distinguish *Service* from petitioner is hard to follow because this Court reversed the Court of Appeals and remanded *Service* to the District Court with the result that Service was reinstated and still is an official of the Department of State. Respondent Secretary could have made a choice of simply removing petitioner without charges, without a hearing, and without infamy, or of removing petitioner on security grounds. When he chose to remove petitioner on security grounds, he was bound to comply with his own regulations which were then applicable to security removals. The record shows that the removal of petitioner was contrary to those regulations in that the charges were not worded with sufficient

specificity, that the security hearing board failed to exercise an independent judgment in making its recommendation to respondent Secretary and that respondent Secretary refused to inform petitioner of the basis for the recommendation or action. A concededly loyal educator cannot be defamatorily removed from a non-sensitive position after a security hearing solely on the basis of undisclosed information furnished by secret informants.

4. Having ordered the removal of petitioner on security grounds, respondent Secretary cannot subsequently sustain his action on entirely unrelated grounds which were never invoked until two years after petitioner's removal. Under our judicial system, the test of the lawfulness of an action is in terms of what was actually done and not what could have been done. In this regard the alterations of the personnel record smacks of a Orwellian rewriting of history.

On each or all of the above reasons, petitioner is entitled to reinstatement to his position in the Department of the Interior, with all the rights and privileges pertaining thereto.

THE ARGUMENT

At the outset petitioner readily concedes that, as an overseas "Schedule A" employee, he held a position excepted from the classified civil service and accordingly lacked tenure under the Lloyd-LaFollette Act, that he has no rights under the Veteran's Preference Act, and is not in any manner covered by the Foreign Service Act. Absent the security regulations of the Department of the Interior, petitioner would not be disposed to question the authority of respondent Secretary to have removed him without the filing of charges, without hearing or other procedures and—be it carefully noted—without infamy to himself or his family.

This case does not present any question of the power of the head of a governmental department to discharge

an employee considered unsuitable without charge or a hearing. Such an employee lacking statutory job protection may be reassigned, demoted, or discharged for no reasons at all. Respondent Secretary could have done so in this case. He did not do so. What respondent Secretary did was to initiate a formidable proceeding for the proclaimed purpose of determining whether petitioner's removal was required by "national security." The issue here is whether respondent Secretary can defame and stigmatize petitioner as a threat to the security of his country through following the formalities of an adjudicatory proceeding without observing the most elementary requirements of a fair hearing.

Nor does this case involve the right of respondent Secretary to use secret information in the course of personnel management. The issue here is whether respondent Secretary, while relying on the formalities of a security hearing, can use confidential information from anonymous informants for the purpose of condemning petitioner as a *security risk* in a situation where whatever security interests may have been involved could have been readily satisfied by simply dismissing petitioner without charges and without the formalities of a so-called security hearing.

The posture of respondents is, apparently what while the suspension and removal of petitioner under the authory of E. O. 10450 was concededly not authorized by the Act of August 26, 1950, as that Act has been construed by *Cole*, the then Secretary of the Interior had general removal authority, and so long as the personnel documents *now* in the files of the Executive show on their face that petitioner had been removed without any reference to his removal as a "*security risk*" under the procedures of Executive Order 10,450, petitioner has no further grounds for relief.

The views of petitioner are to the contrary and are based on his rights under the Constitution, which are the

principal issue on this appeal, his remedial rights under the Act of August 26, 1950, and Department Order 2768, and his rights under the principles of administrative law.

ARGUMENT I

The defamatory dismissal of petitioner under the wrongful authority and without any basis of record was no mere error in "labelling", as held by the court below, but violated petitioner's constitutional rights to pursue his professional calling free of any "badge of infamy."

The right of a professional man to follow his calling, for which he has been trained and recognized by the competent authorities, is a property right entitled to due-process protection by the courts, unless he has forfeited such protection by some act or habit that would justifiably bar him from the educational field. *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915). These due-process standards and procedures have been applied to the revocation of professional licenses of lawyers, seamen, insurance agents, and professional bondsmen.[11]

The unique position of teachers as the "Priests of Democracy" has already been underscored by Mr. Justice Frankfurter in his concurring opinion in *Wieman* v. *Updegraff*, 344 U. S. 183, 196-97 97 L. Ed. 216, 73 S. Ct. 215 (1952) where he said:

> "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which

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[11] *In re Isserman*, 348 U. S. 1, 99 L. Ed. 32, 75 S. Ct. 6 (1954); *Parker* v. *Lester*, 227 F. 2d 709 (9th Cir. 1955); *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215 (1925); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 (1957); *Columbia Auto Loan Co.* v. *Jordan*, 90 U. S. App. D. C. 222, 196 F. 2d 568 (1952); *In re Carter*, 89 U. S. App. D. C. 310, 192 F. 2d 15 (1951), cert. den. 342 U. S. 862, 96 L. Ed. 648, 72 S. Ct. 89.

> alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be examplars of openmindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government."

This Court has repeatedly recognized that "substantial rights affecting the lives and property of citizens are at stake" where a public employee has been removed on grounds of disloyalty or security. *Peters* v. *Hobby*, 349 U. S. 331, 347, 99 L. Ed. 1129, 75 S. Ct. 790 (1955). Dr. Peters himself held a "Schedule A" appointment, as was noted by this Court (note 24 on p. 347), the precise type of appointment held by the petitioner here.[12] In recognizing that "a badge of infamy" attaches to a public employee dismissed on grounds of disloyalty, *Peters* was but following the earlier decision of this Court in *Wieman* v. *Updegraff*, 344 U. S. 183, 190-191, 97 L. Ed. 216, 73 S. Ct. 215 (1952). Distinguishing its earlier decison in *Adler* v. *The Board of Education*, 342 U. S., 485, 96 L. Ed., 517, 72 S. Ct. 380 (1952) which had held that persons seeking

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[12] Dr. Peters held a term appointment which by its own terms had expired at the time of this Court's decision, which rendered moot the matter of reinstatement; and his claim for compensation could only be for time actually worked, which rendered moot the question of back pay. Here petitioner, however, held an indefinite appointment of a full-time position.

employment in the New York Public Schools had "no right to work for the State and the School system on their own terms," this Court in *Wieman* pointed out:

> "To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. • • • We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extent to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Even though it may be conceded as an abstract proposition that petitioner may have had no constitutional right to work for the Department of the Interior, it is submitted that having once been so employed as an educational officer, he thereby acquired a substantive right of property in "a species of tenure and cannot be capriciously excluded and thereby injured financially and profesionally." *Alpert* v. *Board of Governors*, 286 App. Div. 542, 145 N.Y.S. 2d 534 (1955).

The court below recognized the force of the above decisions when it concluded that "Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds." R. 41. But then it went on to hold that "no such dismissal occurred here" and that the "treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing." R. 42 The court below relied heavily[13] on its own decision in *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, affirmed by an equal division in this Court, 341 U.S. 918, 95 L. Ed. 1352, 71 S. Ct. 669 (1951). It also pointed out that in both *Cole* and *Service* this Court had based its decision on "Congressional restrictions" on

[13] See court's "emphasis added" in its note 3, R. 42.

dismissals, whereas in this case there were no such legislative retrictions applicable to the removal of petitioner. In effect, the court below held that petitioner had no constitutional rights unless they were implemented by some Congressional authorization or restriction.

The affirmation of *Bailey* by an equal division of this Court was done on premises which have since been clearly rejected by this Court in *Peters* and *Wieman*. The cornerstone of *Bailey* was the ruling that "the due process clause does not apply to the holding of a government office" and that there is no basic right to Government employ (182 F. 2d 57, 60-61), but *Peters* and *Wieman* clearly held to the contrary. Nor did *Bailey* deem the stigma of disloyalty discharge distinctive from discharge on other grounds (*at.* p. 64), while this Court has emphasized the unique and terrible consequences following from an adjudication that an employee is disloyal or that his continued employment will adversely affect the national security of the United States. Unless *Bailey* is explicitly overruled, it will remain at the core of the constitutional problem in security cases, especially in lower courts, which have been prone to let justice in this area depend upon appeal to this Court.

As long as this removal of petitioner, a highly trained educator, from the Government service as a "security risk" is permitted to stand without his reinstatement, it blights the lives of petitioner, his wife, and the children who bear his name. If respondents object that petitioner was not removed on grounds of disloyalty but only on grounds of security, the short and unhappy answer is that the public draws no such distinction. Nor has it drawn a distinction between a security risk dismissal, which was permitted to stand for two years, and a predated dismissal for unstated reasons. The stain is still upon the petitioner. It has been impossible for him to secure any position in the educational field commensurate

with his professional training. It has been necessary for him for many months to work as a construction worker and not as an educator. These are consequences to petitioner's life, to his family and to his property which ought not to be visited upon him except in pursuance of some lawful justification. As this Court said long ago:

> " * * * the very idea that one man say be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo.* v. *Hopkins,* 118 U. S. 356, 360, 30 L. Ed. 220 6 S. Ct. 1064 (1886):

ARGUMENT II

Where respondents voluntarily expunged the record of all statements adverse to petitioner, their removal of petitioner cannot subsequently be justified on the ground that the record furnished a "rational" foundation for finding petitioner untrustworthy.

The court below found that the dismissal of petitioner by respondent Secretary had both a "rational" foundation and a "sufficient 'statutory' foundation—the constitutional power of the executive to dismiss subordinates: a power not limited in the present instant by statute or regulation." R. 42. Citing *Second Chenery* that an agency's "conclusion will be disturbed only if it lacks a rational and statutory foundation," *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194, 207, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947), the court below held that petitioner had been legally discharged. It cited as its reason that *inter alia,* one of the grounds for dismissal listed in the letter of charges "furnishes a clear basis for the Secretary's action" and quoted the charge that was set forth in numbered paragraph 3 of the letter of charges. R. 43. The court below further reasoned that the charge of untrustworthiness was sufficient to justify

a discharge "even under the herein applicable Lloyd-LaFollette and Veterans Acts," and noted (in footnote 6) further that the "circumstance that the fair gound of dismissal was intimately related to the first [security] ground would seem immaterial here." In the dissent, however, Judge Fahy pointed out that charge 3 or any finding based thereon, could not be read independently of E. O. 10450 or the Act of August 26, 1950. R. 45. A mere reading of Charge 3 plainly shows its origin—namely §8.(i) and (ii) of E. O. 10450. Appendix A. p. 39.

At one moment the court below emphasized its affirmance of the dismissal of petitioner's complaint on the grounds that all relief had already been extended him, namely the expunging the record, and in the next moment held that petitioner was discharged lawfully because the record shows that he was untrustworthy, as found by respondent Secretary on the record. Since the matters expunged were described as "all", it necessarily must follow that nothing of substance in the letter of charges remained in the official personnel records of respondents. And this expunging of the record was presumably a voluntary action by respondents! If the record was expunged of all statements adverse to petitioner, as respondents and the courts below have recited, then the record no longer contains any statement "adverse" to petitioner. That being so, the record can no longer be relied upon to sustain a removal action on grounds which have already been expunged. The reasoning of the court below is indeed suggestive of the lasting stain of a so-called "security risk" label, however mislabelled petitioner may have been. This stain is still here sufficiently for an appellate court to conclude that respondents had a rational foundation for their action against petitioner even after respondents had voluntarily expunged the record of the stain.

ARGUMENT III

At the time of petitioner's suspension and removal, respondent Secretary had limited his authority to remove petitioner as a "security risk" only in accordance with his own departmental security regulations.

Under Department Order 2733 (dated November 9, 1953) respondent Secretary provided that any employee suspended on security grounds would be removed exclusively pursuant to the proceedures of those regulations (Appendix A, pp. 41-42). This appears abundantly clear from §1 of the order which states that it is imperative that *all* persons in the employ of the Department of the Interior shall meet the minimum requirements of national security; from §3 which states that the policy of the department is that no person shall be employed unless such employment is clearly consistent with the interest of the national security; from §6(c) which contains an express exemption for temporary and intermittent employees having a term of employment of six months or less; and from §13 relating to the termination of temporary or probationary or trial employees. The implication is clear beyond any doubt that *all* [14] other employees, whether holding permanent or indefinite appointments, were subject to the security regulations of the Department of the Interior.

From the above recital it must be clear beyond any cavil that respondent Secretary—whatever his authority might have been in the absence of these Departmental security regulations—had limited himself in effecting the removal of any employee on security grounds to effect such removal only according to the procedural safeguards

[14] This was the theory not only of the Department of the Interior but of the entire Executive Branch under E. O. 10450 until this Court decided otherwise in *Cole* v. *Young*, and was once the prevailing theory of the court below. *Cole* v. *Young*, 96 U. S. App. D. C. 379, 266 F. 2d 337 (1955).

of those regulations. In the words of this Court in *Service*, "Having done so he could not, so long as the regulations remain unchanged, proceed without regard to them." Contrary to the proceedings followed against *Service*, petitioner was informed by respondent Secretary that his case was being *exclusively* considered under the Departmental security regulations. Every contemporaneous official statement with respect to the termination of petitioner's employment denotes that the determination to remove him and the termination itself were made under the security order and no other authority.

As a governmental employee who had satisfactorily served his probational period, petitioner under the Departmental security regulations was entitled upon his suspension "in the interest of national security" to:

(1) "A written statement of charges . . . as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit . . ." [§15(a)];

(2) "A hearing before a security hearing board [which shall conduct hearings] in an orderly manner . . . and insure the employee of a full and fair consideration of his case . . . [including the right] to cross-examine any witness offered in support of the charges." [§21(a) and (c)]; and

(3) "A written statement of the decision of the Secretary" [§16(d)].

A. The security charges furnished petitioner were not sufficiently specific in their wording to enable petitioner, on the assumption of innocence, to defend himself. As already related, *supra*, p. 8, it was conceded on the record of the security hearing that petitioner is and has always been loyal to the government of the United States. That being so, the only charges remaining against petitioner were as follows:

"That in fact your associations with the said F—— were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W—— were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that both the said F—— and the said W—— were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations.

* * * *

"3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and and the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and that these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security." R. 5-6.

Elemental fairness requires that charges preferred against a governmental employee for his removal must be "specific enough to provide a fair opportunity for refutation by the innocent who have no knowledge of the conduct charged, as well as the guilty who do possess such knowledge." *Money* v. *Anderson*, 93 U. S. App. D. C. 226, 208 F. 2d 34, 37-38 (1953).[15] While *Money* arose under the Lloyd-LaFollette Act, which is limited to "classified" employees, its standard of fairness in testing the specificity of charges is plainly applicable to other removal cases, such as this action involving petitioner. Note that a similar ruling made in an early "security risk" dismissal case under a 1942 appropriation Act is *Deak* v. *Pace*, 88 U. S. App. D. C., 50, 185 F 2d 997 (1950).

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[15] Followed in *Manning* v. *Stevens*, 208 F. 2d. 827 (D. C., 1953). Also see *Robert J. Morgan*, "Federal Loyalty-Security Removals, 1946-1956." 36 Nebraska Law Review 412-46 (1951).

The Court of Claims has reached the same result in *Blackmar* v. *United States*, 128 Ct. Cl. 693, 120 F Supp. 408 (1954).

In *Simmons* v. *United States*, 348 U. S. 397, 405, 99 L. Ed. 453, 75 S. Ct. 397, (1955), this Court warned that a hearing for conscientious objectors under the Universal Military Training and Service Act was not intended by Congress to be "conducted on the level of a game of blindman's bluff," but rather that petitioner was entitled to a "fair resume" of FBI reports which would permit

> "the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force. The remarks of the hearing officer at most amounted to vague hints, and these apparently failed to alert the petitioner to the dangers ahead. Certainly they afforded no fair notice of the adverse charges in the report."

A charge that petitioner had not told the entire truth concerning his relationship with certain individuals is clearly not sufficiently specific if it does not specify the times, places, and type of "close association" that have allegedly been omitted. If the petitioner told the whole truth in stating his entire knowledge of the situation, how can he respond to a charge that he has left out some unstated matter, if that matter does not exist?

B. A concededly loyal educator cannot be removed from a non-sensitive position after a hearing solely upon the basis of undisclosed information furnished by secret informants. There is no dispute that the security hearing board in recommending adversely concerning petitioner relied upon undisclosed information furnished by secret informants; that petitioner was not informed of the specific contents of such information and was not afforded an opportunity to inspect or refute such information; that petitioner was not informed of the identity of various informants or whether such informants had testified under

oath or whether the information supplied by such informants was based upon hearsay; that petitioner was denied an opportunity to face and cross-examine the informants; and that respondent Secretary relied thereon in removing petitioner.

Under our Constitution " . . . there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 93, 57 L. Ed. 431, 33 S. Ct. 185 (1913). This Court has repeatedly held that "where the disclosure of an informant's identity, or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *United States*, 353 U. S. 53, 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957); *Jencks* v. *United States*, 353 U. S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957). While these cases involved criminal prosecutions, they stand broadly for the proposition that a party threatened with the deprivation of substantial rights, as is any party involved in a proceeding which may result in his being labelled a "security risk", is entitled to the fullest opportunity to defend himself. This is no new doctrine. In *Morgan* v. *The United States*, 304 U. S. 1, 82, L. Ed. 1129, 58 S. Ct. 773 (1938), this Court said, "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

In the absence of findings of fact, there is no way to know which of several conflicting official explanations led to petitioner's removal—whether it was his pacificism as publicly stated to the press, whether it was based on the charges as stated in respondent Secretary's final determination, whether it was based upon some undisclosed charges as stated by the solicitor of the Department of

the Interior, or whether it was based on petitioner's alleged "lack of common sense" as stated by the personnel officer, or even upon no charges at all. R. 11-12. This Court has already drawn attention to the fact that a security hearing

> "convicts on evidence which it cannot even appraise. The critical evidence may be words of an unknown witness who is 'a paragon of veracity, knave, or the village idiot.' His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judges and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal." Concurring opinion by Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 180 95 L. Ed. 817." S. Ct. 624 (1951).

Also in *Peters* Mr. Justice Douglas, concurring, stated that sources of information used to destroy a man's reputation "must be put to the test of due process of law" and that no faceless informer may deprive a person of one of "man's most precious liberties . . . his right to work."

C. The so-called hearing was not a fair hearing. On the face of the transcript of hearing (*supra*, pp. 8-9), it is abundantly evident that the so-called security hearing board and security officer wandered far afield, without any discernible standards of relevance or materiality, from the matter set forth in the letter of charges. Probably the most colorful illustration of the kind of hearing afforded petitioner in 1954 is given in the following exchanges with respect to his votes for President of the United States in 1940 and 1948:

> "Mr. Armstrong [assistant solicitor and security officer for the Department of the Interior]: I think you indicated in an answer or a reply to an interrogatory that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace?
> Mr. Vitarelli: That is correct.

Mr. Armstrong: Norman Thomas was one of those perennial candidates on the Socialist ticket for President.

Mr. Vitarelli: That is right.

Mr. Armstrong: How many times did you vote for him if you care to say?

Mr. Vitarelli: I never voted for Norman Thomas that I remember. I may have been in favor of a lot of his poliices, but I don't remember voting for Norman Thomas.

Mr. Armstrong: How about Henry Wallace?

Mr. Vitarelli: I voted for Henry Wallace once.

Mr. Armstrong: Back in 1948?

Mr. Vitarelli: That is correct.

Chairman Towson [Chairman of the security hearing board]: Just one question on that. Did you not vote for Henry Wallace when he was a candidate for vice-president?

Mr. Vitarelli: Yes, I did.

Chairman Towson: Then you voted from him once more, more than once?

Mr. Vitarelli: That is true. I voted for the Roosevelt New Deal regime of which he was a member; that is true."

Thus did the security hearing board chairman test petitioner's trustworthiness in having stated under oath that he had once voted for Wallace!

D. Petitioner was not furnished with findings of fact or a written statement of the decision to remove him "in the interest of the national security," nor was he informed which specific charge, if any, had been used as a basis for effecting his removal.

The only notification received by petitioner was a letter of "Findings and Determinations" under date of September 2, 1954, (R. 29-31). Nor was petitioner ever given a copy of the recommended decision of the so-called security hearing board. This was contrary to the constitutional requirements of a fair hearing as laid down in *Gonzales v. United States*, 348 U. S. 407, 99 L. Ed. 467, 75 S. Ct.

409 (1955), where this Court, notwithstanding the silence of the Universal Military Training and Service Act, held that a conscientious objector was entitled to a copy of the advisory recommendations of the Department of Justice to the Appeal Board and a reasonable opportunity to reply thereto.

> "Just as the right to a hearing means the right to a meaningful hearing, *United States* v. *Nugent, supra; Simons* v. *United States, supra,* so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendation and arguments to be countered."

Under the logic of this holding, petitioner should have been given a copy of the recommended decision of the so-called security hearing board prior to the final findings and determinations by the then Secretary of the Interior.

As appears from the face of the letter of termination, the findings by the then Secretary of the Interior on the basis of which he purported to order the removal of petitioner did not specify which charges were the basis of petitioner's removal. This lack of specific findings is plainly contrary to *Mulligan* v. *Andrews*, 93 U. S. App. D. C. 381, 211 F. 2d 28, 30, 31 (1954), where the court said:

> "The purpose of requiring this content for the 'reasons' for removal is not to provide a record to facilitate judicial review of such 'reasons' on their merits since review is narrowly limited by the absence of express statutory provision therefor. On the contrary, it is required as a procedural safeguard against just the sort of errors which, if committed at the administrative level, are beyond reach of our review."

To the same effect is the loyalty case of a veteran in *Kutcher* v. *Higley*, 98 U. S. App. D. C. 278, 235 F. 2d 505 (1956) where the court said:

"Since only findings on the charges, specifically identified, can constitute reasons for removal, a reading of the charges must demonstrate the reasons for removal, assuming all the charges are sustained. This is not so here. The first charge . . . could not constitute a valid reason for dismissal. * * * The second charge . . . was not a reason nor, standing alone, even an important detail of the reasons for dismissal. * * * No findings whatever were made specifically relating to this [third] charge.

"The fourth charge was . . . wholly vague. It might be taken merely as a summary of the three preceding charges. If so, it adds nothing to the case against Kutcher. It might also be taken as a broad and sweeping charge embracing numerous unspecified activities and associations. If so, it was too vague and lacks even the specificity this court held necessary in *Deak* v. *Pace, supra.*"

Applying the tests of *Mulligan* and *Kutcher* to the removal of petitioner by respondent Secretary, it is plain that the letter memorandum of respondent Secretary does not comport with this kind of specific finding.[16] Since respondents have conceded that no considerations of "national security," as that term has been judicially interpreted in *Cole*, operate in this case, then it follows that respondent Secretary lacked lawful justification for making such a vague finding.

ARGUMENT IV

Where the legal basis contemporaneously used to remove petitioner fails, as here conceded, the removal itself must fail, and petitioner is entitled to reinstatement, notwithstanding his lack of statutory job protection.

The formal letter of charges preferred against petitioner by respondent Secretary represented to petitioner in unmistakable terms that the determination as to the

[16] The contrary rule of *Cole* v. *Young*, 96 U.S. App. D. C. 379, 226 F. 2d 377 (1955) is of doubtful validity in view of its reversal by this Court.

necessity or advisability of the termination of his employment "in the interest of the United States" would follow upon the recommendation of the so-called security hearing board as to whether petitioner was a "security risk." R. 3-6. This letter specifically referred to the security regulations of the Department of the Interior, which had been issued pursuant to E. O. 10450, and a copy of such regulations was specifically attached to the letter of charges. The phrasing of the charges shows that they were based on §4 of these regulations; the so-called hearing was scheduled under §17 of those regulations; and the hearing paraphernalia generally appeared to be authorized under §§ 19 and 21 of the regulations, subject to the defects already noted above, supra, pp. 24-32.

Petitioner was removed from his employment of the Department of the Interior under a letter of findings and determinations by the Secretary of the Interior, dated September 2, 1954 (R. 29-31). This letter recited on its face that written charges had been proffered against petitioner under the authority of Executive Order 10450 and the Act of August 26, 1950, that these charges had led to the suspension of petitioner as "necessary in the interests of national security," that a hearing had been held before a board of "three disinterested employees of other agencies," that such board had recommended that "the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security," and that after a careful review had been made of the case, the then Secretary of the Interior found:

> "it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interests of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954.
>
> "IT IS THEREFORE, DETERMINED AND ORDERED, that the employment of William Vincent Vitarelli, an employee of this Department of the In-

terior, be, and the same is hereby terminated in the interests of the national security at the close of business on September 10, 1954."

Standard Form 50 of the United States Civil Service Commission, entitled Notification of Personnel Action, was issued on September 24, 1954, and recited that the action of "TERMINATION" of the employment of petitioner was "being taken in accordance with the provisions of Executive Order 10450." (R. 31-32). The record also contains another form 50 (R. 33-34) which is similar in all respects to the Form 50 on R. 31-32 except that the reference to action taken under the provisions of Executive Order 10450 is stricken and a statement is added that this second form is in replacement of a prior form. Otherwise the two forms are identical. Although there is nothing on the face of the other Form 50 (R. 33-34) to indicate that it was executed on any other date than the date of the first Form 50 (R. 31-32), which was September 24, 1954, the second form, as a matter of fact, was executed sometime in September, 1956. This is an example of an Orwellian act of rewriting history which does not, of course, alter the fact that petitioner had nevertheless been removed by the then Secretary of the Interior as a so-called "security risk" under E. O. 10450 and had been defamed in that respect from 1954.

Not until the Government's answer and supporting memorandum was filed in the District Court in 1956 was there any suggestion that petitioner was removed as a "Schedule A" employee quite independently of E. O. 10,450 and the departmental security regulation under which the removal as a security risk was purportedly made in 1954. Essentially, the Government's argument is that the security charges, the so-called hearing and the security procedures were wholly immaterial to petitioner's removal. The argument, however, is squarely contradicted by every relevant word of the contemporaneous record

and flies in the teeth of every document signed by respondent Secretary with respect to the termination of petitioner in 1954.

Whether or not respondent Secretary could otherwise have removed petitioner without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend the procedural protection of E. O. 10,450 and the departmental regulations pursuant thereto. Counsel for respondent Secretary in the course of the pleadings in the District Court argued that the only issue properly before the court were the methods in fact employed by respondent Secretary in discharging the petitioner, supra, p. 11. This would appear to mean that any other justification than those recited on the face of these documents is not available to the respondent Secretary in this action.

It is well established in law that where an administrative agency purports to act under certain authority or standards, its actions must be weighed in accordance with such announced authority or standards. *Securities and Exchange Commission* v. *Chenery Corporation*, 319 U. S. 80, 87, 95, 87 L. Ed. 626, 63 S. Ct. 454 (1943). Executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the District Court. *Perkins* v. *Elg*, 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884 (1939), where this Court said:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. * * * An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained."

Plainly a justification in terms of what respondent Secretary *might have done*, if he had been so lawfully minded, is, and can be, no justification in a United States

court exercising the judicial power under the Constitution of the United States. As Mr. Justice Stone has said, "It is the Court's considered practice not to decide abstract, hypothetical or contingent questions." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

It is now universally agreed by all parties that respondent Secretary lacked the legal authority to act under that E. O. 10,450 or the Act of August 26, 1950, inasmuch as petitioner's position had never been classified as a "sensitive position." It consequently follows that the removal of petitioner was unlawful under the authority used in fact; nor can the removal be defended at this time on the conjectural grounds that the respondent Secretary could have removed petitioner as a "Schedule A" employee and that removal would not have been reviewable in court. The fact of the matter is that respondent Secretary never did so so long as petitioner was an employee of the Department of the Interior. Neither logic nor justice should bar petitioner's reinstatement because he lacks civil-service tenure. As has been shown above, a governmental employee, without regard to tenure has a constitutional right against being tarred with a "badge of infamy" which is the inevitable practical result where he is removed as a security risk according to the wrong procedures and the wrong reasons. Such a tarring directly and seriously prejudices his eligibility to professional employment and the development of his career.

CONCLUSION

In removing petitioner, the Secretary of the Interior acted unjustly, arbitrarily, and unlawfully. Petitioner has been subjected to an intensive inquisition into his personal affairs. His professional reputation has been so tarred that he has been unable to find a job in teaching.

For the foregoing reasons, it is respectfully submitted that the judgment of the courts below should be reversed and the cause remanded to the District Court for the granting of the relief prayed by petitioner in this complaint.

Respectfully submitted,

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APPENDIX A

AMENDMENT 5

To The Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EXECUTIVE ORDER 10450

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.); section 9 A of the Act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

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Section 8(a). The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

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DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 27, 1953.

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington

ORDER No. 2738 November 9, 1953

Subject: Security Regulations

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GENERAL

Sec. 1 *Purpose.*

(a) If the duly constituted Government and the national Security of the United States are to be protected and made secure, it is imperative that all persons engaged in any capacity in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. This order is issued so that the Department of the Interior may have a program designed to insure that the personnel in its employment meet the minimum requirements considered necessary to protect and make secure the Government and the national security.

(b) The regulations in this order are designed to achieve two objectives: first, to make sure that all employees are unquestionably and trustworthy in their capacity as citizens engaged in government activities conducted under our constitutional form of government, second, to guard security information or material, the disclosure of which, would have an adverse effect on national security.

(c) This order prescribes for all bureaus and offices of the Department the procedures, standards and criteria for carrying out these objectives and are issued in accordance with the act of August 26, 1950 (5 U.S.C. 1946 ed., Supp. V, secs. 22-1, 22-2, 22-3), and Executive Order 10450 of April 27, 1953 (18 F. R. 2489), as amended.

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Sec. 3. *Policy.*

(a) It shall be the policy of the Department, based on the act of August 26, 1950 (64 Stat. 476) and Executive Order No. 10450 of April 27, 1953, as amended, to employ and to retain in employment only those persons who

are reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States in their capacity as citizens engaged in government activities conducted under the constitutional form of Government of the United States.

(b) No person shall be employed, or retained as an employee, in the department unless the employment of such person is clearly consistent with the interests of the national security.

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Sec. 6. *Security Investigations.*

(c) *Temporary and Intermittent Employees.* Certain employees in non-sensitive positions whose term of employment is for 6 months or less are, subject to the approval of the Civil Service Commission, exempted from the investigations normally required for non-sensitive positions. Special instructions will be issued concerning such employees by the Director of Security.

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Sec. 13. *Termination of Temporary and Probationary or Trial Employees.* The regulations in this order are not intended to take away any authority which the appointing officer may have to terminate, for cause, temporary and probationary or trial employees.

Sec. 15. *Notification to Employee of Suspension or Reassignment.*

(a) A written statement of charges shall be furnished the employee within 30 days after his suspension or temporary reassignment. The statement shall also inform the employee of his privileges under sec. 16 and if appropriate Sec. 17 of this order. This statement shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit, and shall be subject to amendment within 30 days of issuance.

(b) A copy of these regulations shall accompany the statement furnished the employee. The text of Executive Order 10450 and the act of August 26, 1950, are included in these regulations as Appendix C and D respectively.

Sec. 16. *Appeal Procedure.*

(a) An employee shall be afforded an opportunity to submit affidavits and statements and to answer such charges within 30 days after the receipt of the statement of such charges, or within 30 days after the receipt of an amendment thereof.

(b) Statements in refutation of the charges and supporting documents shall be considered by the Security Legal Officer and the Director of Security, who shall make a joint recommendation to the Secretary for the disposition of the case. If the Security Legal Officer and Director of Security are in disagreement, individual recommendations shall be made by them.

(c) Final decision as to termination of the employee will be made by the Secretary.

(d) A written statement of the decision of the Secretary shall be furnished the employee.

(e) Copies of notices of all personnel actions taken in the case shall be supplied by the bureau or office to the Civil Service Commission.

Sec. 17. *Further Appeal Rights. Permanent or Indefinite Employees.* An employee who is suspended or temporarily reassigned and who is a citizen of the United States and has a permanent or indefinite appointment and has completed his probationary or trial period shall, if he requests, be given a hearing before a security hearing board, constituted and conducting hearings as provided in this order. The decision of the hearing board will be reviewed and considered by the Secretary before a deter-

mination is made with respect to the termination of the employee.

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Sec. 21. *Hearing Procedure.* The following hearing procedure shall be strictly adhered to:

(a) Hearings before security hearing boards shall be conducted in an orderly manner and shall be expedited as much as possible.

(b) Testimony before the hearing board shall be given under oath or affirmation.

(c) The hearing board shall take whatever action is necessary to insure the employee of a full and fair consideration of his case. The employee shall be informed by the board of his right:

(1) To participate in the hearings;

(2) To be represented by counsel of his choice;

(3) To present witness and offer other evidence in his behalf and in refutation of the charges brought against him; and

(4) To cross-examine any witness offered in support of the charges.

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(e) Both the Department and the employee may introduce such evidence as the hearing board may deem proper in the particular case. Rules of evidence shall not be binding on the board, but reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered, so that the hearings shall not be unduly prolonged. If the employee is or may be handicapped by the non-disclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration. If a person who has made charges against the employee and who is not a confidential in-

formant is called as a witness but does not appear and refuses either to permit his deposition to be taken or to answer written interrogatories, his action in this regard shall be considered by the board in evaluating such charges.

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(i) Hearing boards shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

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(k) The board shall reach its conclusions and base its determinations on the transcript of the hearing, together with such confidential information as it may have in its possession. The conclusions and recommendations of the Board with respect to the employee against whom the charges have been made should specifically include a recommendation that the services of the employee be terminated or that termination is not warranted. The board, in making its determination, shall take into consideration the inability of the employee to meet charges of which he has not been advised because of security reasons, specifically or in detail, or to attack the credibility of witnesses who do not appear. The recommendations of the board shall be in writing and shall be signed by a majority of the members of the board. The recommendations of the board, and the complete record of the case including investigative reports, shall be sent to the Secretary for use in his final review of the case.

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Sec. 22. *Revocations.* This order supersedes all previous Departmental security regulations and Secretarial Orders Nos. 2308, as amended, 2459, 2460, 2488, 2489, 2490, as amended, 2491, 2538 and sections 6 and 7 of 2609, as amended.

/s/ DOUGLAS MCKAY
Secretary of the Interior